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In The

Supreme Court of the United States

STAN LABER,

Petitioner,

v.

PETER GEREN, SECRETARY, DEPARTMENT OF THE UNITED STATES ARMY,

Respondent.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Which decision in a series of EEOC decisions, triggers the 90 day period prescribed by 42 U.S.C. § 2000e-16c as receipt of notice of the EEOC's "final decision" or "final action", when each decision orders the agency to take further administrative action?

2. Does equitable tolling apply to the statutory time limits to file a de novo civil action under 42 U.S.C.§ 2000e-16(c) when a remedy is not completely determined or there is no final disposition of matters raised on the remedial portions of an administrative Order?

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Stan Laber, respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit Court of Appeals did not select its opinion for publication in the Federal Reporter. The four EEOC decisions and orders issued by EEOC's Office of Federal Operations (OFO) were not published and are reprinted in date order the Appendix at pages 1 – 44. The decision on appeal to this Court is reported at 316 Fed. Appx. 266 (4th Cir. (Va.) Mar 12, 2009) and reprinted in the Appendix at pages 45 - 55. The Circuit's Denial of Request for Rehearing and Rehearing en banc is at Page 56. The District Court did not publish its opinion in this case. The District Court's Order on Summary Judgment and Reconsideration are reprinted in the Appendix at pages 57 - 78 and 79 - 80. The Fourth Circuit En Banc Decision is reprinted from pages 81-148.

JURISDICTION

The Fourth Circuit filed its decision on March 12, 2009 and entered an order denying petitioner's motion for rehearing on May 08, 2009. This Court has jurisdiction under 28 U.S.C. §1254(1) to review the circuit court's decision on a writ of certiorari. By order (09A78) granted by The Chief Justice the time to file was extended to any including Oct. 2, 2009.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000e-16c

(c) Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant

Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e–5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

STATEMENT OF THE CASE

1. The Administrative Process

Congress expanded the rights afforded under Title VII with amendments to the Civil Rights Act of 1991, 42 U.S.C. § 1981a, expanding the authority of the EEOC to make final administrative determinations of awarded remedies, including reinstatement, backpay, and compensatory damages. See *West v. Gibson*, 527 U.S. 212(1999). Congress intended to "encourage[e] quicker, less formal, and less expensive resolution of disputes within the Federal Government and outside of court." *Id.* at 219. In *Chandler v. Roudebush*, 425 U.S. 840 (1976) this Court explained for the first time that the right under Title VII to file a civil action conferred under U.S.C. 2000e-16(c) "accord[s] a federal employee the same right to a trial *de novo* as private-sector employees. *Id.* at 864. This leaves federal employees who obtain a favorable decision on liability with several choices for substantive review; (1) accept the decision and the remedy awarded; (2) "file a civil action for enforcement" of the administrative decision in district court if the agency is non-compliant; or (3) upon completion of the administrative efforts, "commence *de novo* proceedings pursuant to the appropriate statutes" in district court. 29 C. F .R. 1614.503(g). The applicable statute for seeking *de novo* review of an administrative proceeding upon completion of the administrative process when com-

plainants believe they are still aggrieved is 42 U.S.C. § 2000e 16(c).

2. Petitioner's Administrative Proceedings

Petitioner pursued his Title VII discrimination complaint via the administrative process for over 14 years, from 1989 to 2003. Petitioner, a federal employee, was non-selected for a vacant US Army civilian position in Israel in December 1989. After an EEOC hearing, the Administrative Judge (AJ) found religious discrimination and suggested a remedy of, inter alia, instatement of petitioner in a position in Israel, back pay, benefits, return rights, and grade retention. The Army rejected the decision and found no discrimination. Petitioner appealed to the OFO. The following OFO dated decisions are described in some detail because they are critical to deciding whether petitioner's appeal was a timely appeal of a "final action or order" per 42 U.S.C. § 2000e-16(c).

On December 22, 1998, the OFO reversed the agency decision, finding discrimination. It ordered relief similar to that which the AJ recommended. Petitioner sought reconsideration, claiming, inter alia, that the remedy was not identical to that recommended by the AJ.

On April 11, 2000, the OFO denied petitioner's request and advised that the petitioner only "anticipated noncompliance." The OFO repeated the prior remedy order verbatim and remanded to the

agency to investigate whether or not petitioner was entitled to grade retention. The OFO notified petitioner that he could file a civil action within 90 days or a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement (PFE). Petitioner filed a PFE.

On Jan 23, 2002, the OFO granted the petition and modified, inter alia, the remedy to include return rights and certain pay and benefits. The agency objected to the order through a request for reconsideration and petitioner filed additional PFEs.

On March 10, 2003 OFO decision granted the petition and found for the first time that the agency was in full compliance with the OFO's prior remedial orders, but stated that according to the most recent agency report, "compliance was not complete". The OFO notified Laber of his right to file a civil action within 90 days.

3. Petitioners' Civil Action Proceedings

On June 6, 2003, petitioner filed a civil action. Although the complaint alleged non-selection for a number of positions in Israel and sought not to disturb the OFO on the one position, the district court interpreted the complaint as seeking a greater remedy without placing liability at issue. On June 2, 2004, the court dismissed his complaint stating that Title VII does not allow actions for additional reme-

dies and next denied his request for reconsideration. Petitioner appealed.

The Fourth Circuit convened *en banc* court to consider whether a plaintiff may file a civil action *de novo* under 42 U.S.C. § 2000e-16(c) essentially seeking additional remedy while maintaining a favorably liability determination obtained during the administrative proceedings. In its *Laber v. Harvey*, 438 F.3d 404 (4th Cir. 2006) *en banc* decision, the Fourth Circuit reversed and remanded, overruling its prior precedent and aligned with a majority of the other circuits holding that plaintiffs must litigate both liability and remedy when seeking a civil action under 42 U.S.C. § 2000e-16(c). Petitioner was allowed to amend his complaint on remand in view..

Petitioner amended his complaint on remand and added claims allowed by the magistrate judge. On January 23, 2007, the district court ruled on summary judgment that petitioner's count for discrimination based on non-selection was untimely for failing to file the civil action with 90 days of the OFO's second decision on April 11, 2000 wherein the OFO denied reconsideration as premature and "anticipating non-compliance". The district court denied petitioner's reconsideration request and petitioner appealed again.

The Fourth Circuit affirmed the district court in an unpublished per curiam opinion on March 12, 2009. The Fourth Circuit held the OFO's final action taken on March 10, 2003 "is not the relevant 'final'

decision," but instead the April 11, 2000 interim decision on a request for reconsideration was the "final decision" for purposes of starting the 90-day clock under the Statute and found the doctrine of equitable tolling as inapplicable. Petitioner now seeks certification for review with this Court because the circuits are in conflict on the important issue of what is considered the "final action" by the OFO when there is a series of decisions following the liability decision.

SUMMARY OF ARGUMENT

Although the EEOC ruled in petitioner's favor on the merits, it took a lengthy series of EEOC and agency actions until the EEOC finally issued an order that established that it was giving less than what petitioner sought in the remedy. The Fourth Circuit ruled that if an employee is not satisfied with the remedy, he must put the favorable liability ruling at risk and litigate the whole case de novo in federal court.

Even if this Court agrees that such appeals must include liability, petitioner remains aggrieved in that his appeal was deemed untimely. Petitioner argues that the court should have found his appeal timely based on the fact that he filed his action within 90 days of the EEOC's final disposition based on 42 U.S.C. § 2000e-16c. The Fourth Circuit's finding is so chilling for millions of federal employees, it begs for this Court's reversal. Simply put, it requires an ag-

grieved employee to bring suit before even knowing if he or she is dissatisfied with the outcome of the proceedings. He cannot wait for the OFO "final disposition". It also finds that that the EEOC's instructions used in their decisions are not binding and, even if in error, have no sway. Finally, the Fourth Circuit invented the term "relevant final decision" to add new meaning to 42 U.S.C. § 2000e-16c, wreaking havoc with its plain language of "final action", final order, and "final resolution". Plaintiff argues that those complainants who choose to exhaust their remedies in the administrative process, should not be foreclosed from filing civil actions, particularly when they follow the EEOC's instructions..

The Fourth Circuit was intent on using the case to reverse itself and gave only passing consideration to petitioner by allowing the remand. When petitioner returned however, The 4th Circuit said the 90 day clock started running before the remedial proceedings were over and although petitioner was diligent, he was now retroactively late. Had this case been before the Fifth or DC circuits, petitioner's suit would have been timely.

REASONS FOR GRANTING THE PETITION

1. THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUITS AS TO WHETHER 42 U.S.C. § 2000e-16c ENTITLES AN AGGRIEVED FEDERAL EMPLOYEE THE RIGHT TO FILE A CIVIL ACTION SEEKING DE NOVO REVIEW OF

AN EEOC ADMINISTRATIVE DECISION THAT RESULTS IN LESS THAN A COMPLETE REMEDY

The split focuses on the incoming posture of those cases where an agency has been found liable for prohibited discrimination but employees don't receive adequate remedies. Some circuits take a very narrow view, such as that of the Fourth Circuit in this case, that only considers appeals of civil actions arising from final EEOC decisions made on appeals from agency decisions. Other circuits, however, take more liberal views. The Fifth and District of Columbia Circuits consider appeals from agency decisions as well as EEOC decisions and any other administrative decisions that are based on a final action, a final order, a final disposition, or where the employee remains aggrieved at the end of the entire administrative process. The former group is more focused on the EEOC regulations and the latter group is focused on the statute which allows a civil action after the final order or final disposition, which usually occurs long after the decision on liability.

Although 42 U.S.C. § 2000e-16c states that an employee may file a civil action if "aggrieved by the [employing agency's or EEOC's] final disposition of [a] complaint" or by the "failure [of the employing agency or EEOC] to take final action on [a] complaint" in a timely manner, the circuits have been split about what constitutes "final action", "final disposition", and when and how the agency or EEOC each effects its final disposition.

In the instant appeal, the Fourth Circuit fashioned the term "relevant final decision" and defined it as the EEOC decision made on an appeal of an agency decision. Several other decisions by the EEOC OFO followed it, but according to the court, these later decisions do not represent the "final action" or "final disposition".

Most importantly, the Fourth Circuit found the "relevant final decision" is the single decision made by the EEOC that that should be used to determine the timeliness of a civil action when there is an appeal. The court relied on 29 CFR §1614.407 which states in pertinent part:

> *1614.407 Civil action: Title VII, Age Discrimination in Employment Act and Rehabilitation Act.*
>
> *A complainant who has filed an individual complaint, an agent who has filed a class complaint or a claimant who has filed a claim for individual relief pursuant to a class complaint is authorized under title VII, the ADEA and the Rehabilitation Act to file a civil action in an appropriate United States District Court:*
>
> *(a) Within 90 days of receipt of the final action on an individual or class complaint if no appeal has been filed;*

> *(b) After 180 days from the date of filing an individual or class complaint if an appeal has not been filed and final action has not been taken;*
>
> *(c) Within 90 days of receipt of the Commission's final decision on an appeal; or*
>
> *(d) After 180 days from the date of filing an appeal with the Commission if there has been no final decision by the Commission.*

The Fourth Circuit's opinion holds that the 90 day clock under 1614.407(c) starts with the first decision on an appeal and may be tolled only one time on a "request for reconsideration" irrespective of later decisions, whether the reconsideration request was denied as premature, or if it resulted in further administrative action being required of the agency, as it is in most cases requiring calculations of a finite remedy.

The Fifth Circuit decision in *Massingill v. Nicholson*, 496, F.3d. 382, 385(5th Cir. 2007) stands in direct conflict with the Fourth Circuit's narrow interpretation. Ms. Massingill, like petitioner, obtained a favorable OFO decision which ordered the agency to calculate her remedy. Unhappy with the limited remedy calculated, Ms. Massingill went back to the OFO several times with requests for reconsideration and petitions to enforce. Ultimately the OFO affirmed the Agency's compliance efforts and Ms. Massingill

filed a civil action seeking more remedy. The Fifth Circuit, citing the *Laber v. Harvey en banc* decision, agreed that *de novo* civil actions must put liability at risk, and reversed and remanded. The Fifth Circuit went further and noted that "we don't think that Massingill must disgorge or offer to disgorge the money she received so far for her case to proceed." *Id.* at 386. Exactly to the point of this petition, the Fifth Circuit stated "there is nothing in the statute creating the right of action, 42 U.S.C. § 2000e-16(c), which precludes suit if the award has been partially or even completely rendered. *Id.* The Fifth Circuit had no problem with the fact that Massingill had not filed her civil action when the OFO issued its "relevant" final decision but, like, Laber, continued the administrative process, obtained some of her remedy, and then filed suit. She did not file her suit when the liability decision was made.

Similarly, in Wilson v Pena, 79 F.3d 154, the court was faced with the same timeliness and equitable tolling issues, multiple PFEs, and ambiguous OFO decisions. It found that a PFE qualifies as a final decision that may trigger a civil action. The court stated

> *Considering the statutory scheme and its remedial purposes, we conclude that such a petition is an "appeal from a decision" of an agency within the meaning of § 717(c), and that a petitioner can therefore proceed to court after 180 days have passed without final agency action. ...*

> *The statutory language imposing the obligation to take final action within 180 days performs a similar function when applied to a petition for enforcement as it does when applied to the first appeal to the EEOC on the merits of the underlying claim. See Grubbs, 514 F.2d at 1328; see also Hackley v. Roudebush, 520 F.2d 108, 118-21, 136 (D.C.Cir.1975). In both instances the EEOC is accorded a limited period of time to decide the appeal, while the complainant is assured of having reasonably prompt access to the courts. This approach is consistent with the balance that Congress has struck. See Brown v. General Servs. Admin., 425 U.S. 820, 832-33, 96 S.Ct. 1961, 1967-68, 48 L.Ed.2d 402 (1976). It also avoids creation of "a massive procedural roadblock to access to the courts." McRae v. Librarian of Congress, 843 F.2d 1494, 1496 (D.C.Cir.1988) (per curiam) (quoting President v. Vance, 627 F.2d 353, 362 (D.C.Cir.1980)). We conclude that Wilson obtained a right to sue 180 days after he filed the petition for enforcement, at which time there had been no final action.*

The Wilson v. Pena court was focused on the "final action" and "final disposition" of the matter and not the "final decision" of the OFO on liability alone. The court recognized that there may well be multiple

agency decisions and multiple EEOC decisions with each beginning its own 180 day period for resolution. There may also be multiple 90 day periods following a variety or series of decisions, of which only the last can be the final decision. There can also be multiple 180 day periods to be properly followed. The last decision is the one that finally disposes of all issues and, of course, there can only be one. In this petitioner's case, he followed the appeal instruction inserted in the PFE to file his civil action within 90 days. The Pena court also relied on the statute that the complainant must be in "receipt of notice of final action taken" by an agency after 180 days from the date of filing an appeal with the Commission if there has been no final decision by the Commission. Every time the complainant files "an appeal", even an appeal on a decision of the EEOC (and EEOC order or decision) or the agency, the 180 day clock begins to tick. The Fourth Circuit found the April 11, 2000 decision to be controlling despite that fact that the petitioner believed it was in his favor and opted for filing a PFE. But the Wilson v. Pena court in reviewing a similar EEOC order that Wilson received regarding his performance award for back pay stated: "In light of the need to construe Title VII's procedural rules in a way that allows legally unsophisticated employees to negotiate the process, *Loe*, 768 F.2d at 417, it would be inappropriate to start the clock when Wilson received an order that he reasonably believed to be entirely in his favor, simply because the agency later disagreed with his interpretation."

The Fourth Circuit stands in direct contradiction with the Fifth Circuit by holding that interim decisions prior to or after PFEs and partial acceptance of a remedy preclude the filing of a civil action *de novo* under 42 U.S.C. § 2000e-16(c). Essentially the Fifth Circuit allows plaintiffs to file civil actions seeking additional remedy provided liability is put at risk, but the Fourth Circuit permits such civil actions only if the complainants choose not to exhaust their administrative remedies. The DC and Fifth circuits consider EEOC decisions on PFEs to be tolling.

When Congress introduced the language permitting aggrieved federal employees the right for substantive review of final orders issued by the Civil Service Commission, it clearly did not distinguish between final orders and perceived "relevant" final orders as now distinguished by the Fourth Circuit. See Decision at page 6 ("the March 10, 2003 decision is not the relevant "final" decision"). The congressional record reveals::

> *The bill (section 717(c)) enables the aggrieved Federal employee (or applicant for employment) to file an action in the appropriate U.S. district court after either a final order by his agency, a final order of the Civil Service Commission on an appeal from an agency decision or order in any personnel action in which this issue of discrimination on the basis of race, color religion, sex or national origin has been raised by the aggrieved person.*

> *It is intended that this employee have the option to go to the appropriate district court or the District Court for the District of Columbia after either the final decision within his agency on his appeal from the personnel action complained of or after an appropriate appeal to the Civil Service Commission or after the elapse of 180 days from the filing of the initial complaint or appeal with the Civil Service Commission. Senate Report 92-415, First Session of the 92nd Congress, October 28, 1971, Pages 17-18.*

Congress clearly enunciated that the rights afforded under 717(c) to include not only the access to district court after a final order by an agency, a final order of the EEOC on an appeal from an agency decision, but also on any personnel action in which the issue of discrimination has been raised. It was intended that federal employees, as lay plaintiffs, would have substantive access to the district courts and not be barred by procedural hurdles and pitfalls. See Girard v. Rubin 62 F.3d 1244, 1248 (9th Cir. 1995)(In Title VII cases, the government cannot be at war with itself by expressly authorizing a civil action right in its EEOC form and then argue a contrary position).

2. EQUITABLE TOLLING SHOULD APPLY TO INTERIM DECISIONS MADE BY THE EEOC WHERE FINAL DETERMINATION OF ALL REMEDY IS NOT DETERMINED AND A

REASONED DECISION TO FILE A DE NOVO CIVIL ACTION TO LITIGATE REMEDY IS STYMIED.

Even if the district court below and the Fourth Circuit were correct on the issue of timeliness with respect to a strict statutory construction, the doctrine of equitable tolling as enunciated by this court in *Irwin v. Dep't of Veteran Affairs*, 498 U.S. 89 (1990) tolled the 90-day timeline until the OFO issued its final action resolving all outstanding remedial issues but still not finding that the agency completed its compliance. Petitioner specifically relied on the then current Fourth Circuit precedent, the language of the statue, and the OFO instructions when he opted to not file his civil action following the April 11, 2000 OFO decision.

The Fourth Circuit en banc court in this case reversed its prior precedent to align with the majority of other circuits who have addressed this issue with no concern for the outcome of petitioner's case. This Court in its *Irwin* decision expressly listed factors which should be considered in deciding whether to apply the equitable doctrine of tolling to the statutory deadlines set forth in Title VII. One factor should have been the "Catch-22" created by the en banc court. The Fourth Circuit nevertheless and unexplainably refused to embrace the doctrine of equitable tolling as set forth in this Court's *Irwin* decision as applicable under these facts. Like a defective pleading, the defect of timeliness could not be foreseen by a lay plaintiff as the law clearly permitted awaiting

determination of all remedy prior to *de novo* litigation.

Moreover and importantly, as the Fourth Circuit's opinion states, the agency

> "took 78 days to calculate his backpay and other elements of his remedy, whereas the OFO order had given the [agency] only 60 days. While we do not approve the [agency's] late response, it does not support equitable tolling". Decision at pp 7-8.

Viewed in the totality of the circumstances wherein a decision to file a *de novo* civil action or continue to exhaust administrative remedies through a petition to enforce, must be decided within a short 30 day window between the 60th and 90th day, it is inequitable to preclude a *de novo* civil action where delay by the agency forces the complainant to file a petition to enforce with the EEOC and the EEOC subsequently deems the late remedy in compliance. Common sense dictates that substantive review by the district court through *de novo* civil action should still be available to complainants aggrieved by the final disposition and the EEOC could be in error.

Failure to timely determine a complete remedial award is precisely the point at bar and the Agency's own failings in this regard is precisely the type of act this Court noted as supporting an application of equitable tolling in a Title VII case where an adver-

sary's conduct caused the deadline to pass. The Fourth Circuit relied on the EEOC's finding that the Army "fully complied" but as discussed herein, the Army never fully complied and the EEOC made ambiguous statements about compliance.

In this case the decision to file a timely PFE in lieu of a *de novo* civil action at the time was perfectly in tune with this Court's prior precedent. The applicable 90 day deadlines under 717(c) should have tolled pending the final disposition on the PFE which was rendered in March 10, 2003. The Fourth Circuit's opinion to the contrary stands at odds with this Court's *Irwin* precedent and dicta.

3. THIS COURT SHOULD PROVIDE GUIDANCE THAT ENSURES CONGRESSIONAL INTENT FOR TITLE VII PREVAILS IN THE FACE OF THE CHILLING EFFECT OF THE FOURTH CIRCUIT DECISION.

The Civil Rights was enacted in response to a series of United States Supreme Court decisions which limited the rights of employees to sue for unlawful discrimination and it strengthened the ability of the EEOC to eliminate discrimination and enforce remedies. For Federal employees, it resulted in a large EEOC workload that persists today. Because of this heavy burden, EEOC decisions do not include details of the remedy (ies). To conserve resources, both the AJ and the EEOC make clear decisions regarding liability but remedies are only vaguely directed. The details of the remedy, however, are left for the agency

to determine. A decision on a PFE usually remands various issues and resets the dates for compliance. The OFO, however, does not hold an evidentiary hearing or give either party a second chance to argue its position in any matter. Frequently, the OFO simply errs. For the Fourth circuit to deny court review of OFO PFE decisions because they follow decisions on appeal, particularly when these PFE decisions are actually reconsideration decisions, is to literally foreclose the most critical civil actions. Federal employees only learn of their remedies well after the decision on liability. Indeed, OFO remedial decisions don't even order the remedy to be provided until 90 days from the liability decision, giving employees no time to file a civil action before finding out the remedy the agency intends to provide. This Court has the opportunity to rectify these shortcomings for the benefit of all parties by focusing attention on how various EEOC decisions, including PFE decisions, relate to the "final resolution" and "final disposition" relative to the language of the statute.

This case, in particular, highlights the plight of Federal Employees who have suffered discrimination, but who are unable to obtain their EEOC mandated remedies. Typically, employees toil in the administrative arena for about 5 years, petitioner for 13 years. EEOC regulations, procedures, and instructions are ambiguous and often are counter to the statute so courts are unable to efficiently review cases. This often closes the door to appeals only because courts lack this Court's guidance. If this Court grants this petition, the Court can resolve the current

split in circuits, reconcile the differences in the law versus EEOC regulations, and assist the courts in properly interpreting such appeals. Even though the number of such cases is small, they are the most important cases because discrimination has not been remedied. It can restore the faith of millions of Federal employees in the Commission, the courts, and this historic law.

The question posed here, as to whether or not such aggrieved employees are entitled to *de novo* review of an EEOC remedy decisions, should be clearly be "yes" because that is the essence of 42 U.S.C. § 2000e-16c, if they are aggrieved by the final resolution of their complaints and are timely. The Fourth Circuit, however, has seized EEOC regulation 29 CFR §1614.405 (Decisions on appeals), to pose a novel hurdle that if not overturned will set back Title VII back to pre-1964 days. The hurdle is benign on its face, but if not overturned by this Court, has dire consequences because the interpretation undermines civil actions. In pertinent part, 29 CFR §1614.405, Decisions on appeals, states:

(a) The Office of Federal Operations, on behalf of the Commission, shall issue a written decision setting forth its reasons for the decision. The Commission shall dismiss appeals in accordance with 1614.107, 1614.403(c) and 1614.410. The decision shall be based on the preponderance of the evidence. If the decision contains a finding of discrimination, appropriate remedy(ies) shall be included and, where appropriate, the entitlement to interest, attorney's fees

or costs shall be indicated. The decision shall reflect the date of its issuance, inform the complainant of his or her or her civil action rights, and be transmitted to the complainant and the agency by certified mail, return receipt requested.

(b) A decision issued under paragraph (a) of this section is final within the meaning of 1614.408 unless:

(1) Either party files a timely request for reconsideration pursuant to1614.407; or

(2) The Commission on its own motion reconsiders the case.

The Fourth Circuit decided that because (b)above deems such a decision as "final" in regard to 29 CFR §1614.408 (Civil action), the decision triggers the 90 day clock for a civil action if not extended by a reconsideration decision. The EEOC regulation above does not preclude other circumstances and decisions from qualifying as "final"; only that a decision on reconsideration is one of those that might qualify. The Fourth Circuit, in rejecting other EEOC decisions and orders as equally qualifying, denies complainants their individual rights of action.

The EEOC regulations do not comport to the statute because the statute doesn't use the EEOC regulation phrase "Commission's final decision on an appeal" but uses "receipt of notice of final action taken by [an], agency, or the Equal Employment Opportunity Commission". The Fourth Circuit decision, therefore, while not technically incorrect, glosses over major differences and additional avenues

to civil actions. It also overlooks the rest of the statute, particularly the part where an employee "if aggrieved by the final disposition of his complaint or by the failure to take final action on his complaint ....may file a civil action."

The following are the most striking differences in regard to the 90 day trigger as viewed through the statute. A civil action is prompted by a "receipt of notice of final action taken"; the "final action" may have been taken by the agency or by the Commission; the final action must have been actually taken; there must have been a notice; the notice must communicate the action taken, the notice must be received. If after 180 days, the agency or the Commission fails to issue an order or decision, or fails to take final action, or fails to provide notice of having taken final action, or if the employee is aggrieved by the final resolution, he may file a civil action.

Section 713 of the statute requires that regulations issued by the Commission shall be in conformity with the standards and limitations of the Administrative Procedure Act, wherein the term "order" "means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including, licensing" and " "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief or the equivalent, or denial, thereof, or failure to act."

Clearly, the Fourth Circuit lost sight of the statute in clinging to the EEOC regulation and limiting court access to nearly all employees who prevail on liability and seek their remedies. Invariably, there are numerous appeals, reconsideration requests, and agency and OFO decisions. A court must evaluate each decision and order to count the relevant 90 days for each appeal and count the 180 days to discern the entitlements that may flow from each, not only whether there was compliance at one point in time in regard to one EEOC order or decision. Petitioner received 12 compliance reports from the agency, one Final agency Decision (FAD), five separate decisions on certain relief over a period of approximately ten years. From the OFO, Laber received five decisions from 1998 to 2003. The last OFO decision dated March 10, 2003 was a decision on cross appeals for reconsideration from Laber and the Army, it stated, inter alia:

"This decision of the Commission is final, and there is no further right of administrative appeal from the Commission's decision. You have the right to file a civil action in an appropriate United States District Court within ninety (90) calendar days from the date that you receive this decision." The decision also stated:

"In light of the arguments made by the agency, and in the absence of contrary evidence presented by petitioner, the Commission now finds that it was an error to direct the agency to provide petitioner with return rights to his former position with the DLA upon com-

pletion of his assignment in Germany. However, as noted by the agency, upon completion of petitioner's overseas tour with the agency, he will be eligible to be placed in the DOD's PPP, returning him to the PPP region from which he reported for his overseas duty."

"The Commission further finds that the agency has fully complied with the Commission's Order in Stan Laber v. Department of the Army, EEOC Appeal No. 01973838 (December 22, 1998) request for reconsideration denied, EEOC Request No.05990372 (April 10, 2000)."

"The agency's final compliance report stated that it had not yet complied with the provision of the Order relating to payment of back pay and allowances."

Indeed, because the March 10, 2003 fashioned a whole new remedy, the boilerplate instruction that should have been issued is the one that was used in the initial appeal decision of December 22, 1998 which allowed for further reconsideration. The above excerpts from the March 10, 2003 OFO decision taken as a whole, together with the other prior decisions and appeals, are very representative of what a Federal employee must endure.

Indeed, since the OFO reconsidered a prior decision by retracting return rights and creating a new remedy that has to this day not been granted or acknowledged by the agency, and the OFO itself stated that compliance was incomplete in regard to payment of back pay and allowances, it is difficult to accept the

Fourth Circuit's view that an innocuous OFO decision years earlier was the most relevant final decision. This is especially so when each OFO decision is a "reconsideration" because each modifies orders issued previously.

3. THIS COURT SHOULD PROVIDE GUIDANCE TO RESTORE THE CENTRAL ROLE OF THE EEOC BY RULING THAT ITS ORDERS AND MANAGEMENT DIRECTIVES SHOULD BE BINDING AND IF IN ERROR, TREATED AS AMBIGUOUS AND IN NEED OF CORRECTION BUT NOT TO THE DETRIMENT OF THE AGGRIEVED.

If seems counter to the intent of the statute that the EEOC remedies and clarifications on those remedies are not reviewable by the courts if they follow the liability decision by 90 days.

The EEOC frequently make errors and provides erroneous instructions. In the instant case the April 11, 2000 decision instruction that the Fourth Circuit was clearly an error. This decision, even though it was viewed by the court as a denial of a request for reconsideration, final, and required that a civil action to be filed within 90 days, it should not have been included because it was actually a remand to the agency for the agency to determine whether or not petitioner was entitled to grade retention. It stated in pertinent part:

[Footnote 2] The Commission agrees with the AJ in that the evidence is insufficient to resolve the grade retention issue and orders the agency to determine if complainant would have been entitled to pay retention if selected for the Industrial Specialist position in 1990.

Because this is exactly what petitioner sought, the decision was not denied, it either granted petitioner's request (or was a sua sponte reconsideration) because it remanded the case to the agency for further administrative action to determine an additional remedy. The notice clearly referred to further action, and before that occurred, the action could not be considered as final. The following the boilerplate in the April 11, 2000 decision was in error:

> This decision of the Commission is final, and there is no further right of administrative appeal from the Commission's decision. You have the right to file a civil action in an appropriate United States District Court WITHIN NINETY (90) CALENDAR DAYS from the date that you receive this decision.. See Appendix page 50.

The instruction should have included a boilerplate similar to that used in the December 22, 1998 decision remanding to the agency:

> RIGHT TO FILE A CIVIL ACTION (T/A0993). This is a decision requiring the agency to continue its administrative processing of your complaint. However, if

> you wish to file a civil action, you have the right to file such action in an appropriate United States District Court. It is the position of the Commission that you have the right to file a civil action in an appropriate United States District Court WITHIN NINETY (90) CALENDAR DAYS from the date that you receive this decision.... (See Appendix page 42).

Additionally, the April 11, 2000 decision instructed that petitioner could file a civil action before or after the PFE using the boilerplate:

> IMPLEMENTATION OF THE COMMISSION'S DECISION (K1199) Compliance with the Commission's corrective action is mandatory. The complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 64 Fed. Reg. 37,644, 37,659-60 (1999) (to be codified and hereinafter referred to as 29 C.F.R. §§ 1614.407, 1614.408), and 29 C.F.R. § 1614.503(g).

The Fourth Circuit ignored this language and additionally stated that 29 C.F.R. § 1614.503(g) was inapplicable because the agency was found to be in full compliance. Not only was the agency not in full compliance in April 2000, it was never in compliance based on the March 10, 2003 decision. Similarly, the Fourth Circuit rejected the language of the EEOC's

Management Directive 110. Petitioner argued that the EEOC's Management Directive 110, Chapter 9, requires "If the decision remands the complaint for further agency consideration, the parties retain the rights of appeal and reconsideration with respect to any subsequent decision." But the court said the argument "ignores the sentence directly preceding the one upon which he relies, which reads "The Commission's decision on a request for reconsideration is final, and there is no further right by either party to request reconsideration." (Emphasis added)." See Appendix page 7.

6. THIS COURT SHOULD REQUIRE THE

6. THIS COURT SHOULD CLARIFY THE STATUTE AND ALLOW CONGRESS TO ADDRESS THE UNFORTUNATE MORASS CREATED BY THE CONFLICTING REGULATIONS

Petitioner's case and others like it are tossed around for years because complainants can't understand their rights. The EEOC's OFO uses "boilerplate" instructions that cannot be understood as a whole, are not identified as to which part(s) of the decision they apply or don't apply, there is no explanation of the interaction of following one path and not another or if there any simultaneous paths, or how one choice precludes another choice later. This is so bewildering to complainants and their representatives that it impedes justice. In August 2009, the United States Government Accountability Office (GAO) in its Report 09-712, Equal Employment Op-

portunity – Pilot Projects Could Help Test Solutions to Long-standing Concerns with the EEO Complaint Process, provided results of its three year study to survey EEO practitioners, including OFO appeals attorneys, as to factors that impeded the prompt, fair, and impartial processing of EEO complaints. Hundreds of responses were grouped and ranked into eight categories by importance for improving the federal EEO process. GAO reported that one of the top six factors was: "lack of clarity in regulation and some guidance and consistent decisions from EEOC".

It is crucial for this Court to clarify the right to file a civil action because the lack of quality decision making at the administrative level and lack of guidance to the circuits have foreclosed valid complaints in direct contradiction with the very intent of Title VII.

CONCLUSION

Because the Fourth Circuit's opinion is at odds with the Fifth and DC Circuits and at odds with this Court's own prior precedent, the Court should grant this petition for writ of certiorari and reverse the decision of the Fourth Circuit Court of Appeals.

Respectfully Submitted,

Stan Laber,
Petitioner

APPENDIX

OFO Decision December 22, 1998
COPY

Decision of the OFO dated Dec 22, 1998.
Stan Laber v. Department of the Army
01973838 December 22, 1998
Stan Laber, Appellant,
v. Appeal No. 01973838
Agency No. 0793061E
Louis Caldera, Hearing No. 100-94-7118X
Secretary, Department of the Army, Agency.

DECISION

On April 11, 1997, Stan Laber ("appellant"), by and through his attorney, timely appealed the agency's final decision, dated March 4, 1997, concluding he had not been discriminated against in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.2000e et seq. Appellant had alleged that, in 1991, agency officials discriminated against him on the basis of his religion (Jewish) and in reprisal for engaging in prior EEO activity when he was not selected for an Industrial Specialist position in Israel. This appeal is accepted in accordance with the provisions of EEOC Order No. 960.001.

At the time this matter arose, appellant was employed by the agency as an Operations Research Analyst in Illinois. The record reveals that appellant had substantial education (a master's degree and

courses toward a Ph.D.) and training (over one hundred employment training courses). Appellant began his civilian military career in 1981. He received an "Exceptional" performance appraisal in 1991.

Appellant stated that, in 1987, he began attempts to secure civilian employment in the country of Israel. From 1987 to 1990, he sent approximately 40 applications to the Army and other Defense Department agencies. During his various attempts to secure employment, appellant became familiar with the Commander of the Tel Aviv Contracting Office and the Chief of the Contract Administration Branch, Middle East Section (the Selecting Official). Appellant stated that he directly contacted both of these individuals on numerous occasions inquiring about employment opportunities in Israel. Appellant also stated that, during the course of these conversations as well as all of his Israel employment inquiries, he mentioned that part of his motivation for seeking a job in Israel was his Jewish heritage.

In June of 1990, the position of Industrial Specialist, GS-1150-11, became vacant in Tel Aviv, Israel. The Selecting Official ("SO") reviewed the applications (including appellant's) referred by the Civilian Personnel Office and decided not to select anyone from the list. The SO stated that none of the applicants had the current experience necessary for the position and that he later selected the Selectee from an alternative referral source.

On August 16, 1991, appellant filed a formal EEO complaint alleging nonselection because of his religion. He testified that, during his telephone interview, the SO asked him a question that sought to determine if appellant as [a] Jew could be objective when dealing with contractors in a Jewish country. Appellant also asserted that he was qualified for the position and that the SO had no legitimate reason to reject his application. The agency accepted appellant's complaint and conducted an investigation. Upon completion of the investigation, appellant requested a hearing before an EEOC Administrative Judge ("AJ").

On January 7, 1997, following a hearing at which six witnesses testified, the AJ issued his recommended decision ("RD")concluding that the evidence supported a finding of religious discrimination. In reaching this conclusion, the AJ found that the evidence strongly supported appellant's claim that the SO discriminatorily considered his religious beliefs in the selection process. In light of appellant's strong qualifications for the position and the SO's lack of credibility, the AJ determined that, absent any other reasonable explanation, it must have been appellant's religious convictions that kept him from being selected for the position. Therefore, the AJ concluded that appellant met his burden of establishing unlawful discrimination on the basis of his religion. As for appellant's contention that his SF-171 was processed in a discriminatory manner, the AJ found that appellant failed to produce evidence to support this contention.

On March 4, 1997, the agency issued its final agency decision ("FAD"), in which it adopted the AJ's finding of no discrimination regarding the processing of appellant's SF-171 and rejected the finding of religion-based discrimination.<1> It is from this decision that appellant now appeals.

After a careful review of the record in its entirety, including the statements submitted on appeal, the Commission finds that the AJ's recommended decision sets forth the relevant facts and properly analyzes the appropriate regulations, policies and laws. Nothing proffered by the agency in its FAD or on appeal differs significantly from the arguments presented at the hearing and given full consideration by the AJ. Therefore, the Commission discerns no basis upon which to overturn the AJ's finding of discrimination in this matter. In this regard, the AJ made specific credibility findings which are entitled to deference due to the AJ's first-hand knowledge, through personal observation, of the demeanor and conduct of the witnesses. See Esquer v. United States Postal Service, EEOC Request No. 05960096 (September 6, 1996); Willis v. Department of the Treasury, EEOC Request No. 05900589 (July 26, 1990).

Accordingly, it is the decision of the Equal Employment Opportunity Commission to AFFIRM the FAD in so far as it adopted the AJ's finding of no discrimination regarding the processing of appellant's SF-171. However, we REVERSE the FAD in so far as it failed to adopt the AJ's finding of discrimination

based on religion. The matter is REMANDED for the agency to comply with the terms of the ORDER below.

ORDER

The agency is ORDERED to take the following remedial action:

(A) Within thirty (30) calendar days of the date this decision becomes final, the agency is directed to offer appellant immediate placement in an Industrial Specialist GS-11 position in Israel, or a substantially equivalent position even if such position is at a GS-12 or 13 level providing that appellant is qualified for such position.

(B) The agency shall determine if appellant is due any backpay, interest and other benefits, pursuant to 29 C.F.R. §1614.501, no later than sixty (60) calendar days after the date this decision becomes final. In conjunction with its back pay determination, the agency shall determine if appellate would have been entitled to retain pay at the GS-13 level, if he had been selected in 1990.

(C) The agency shall provide training in the obligations and duties imposed by the Title VII to the management officials responsible for the actions at issue.

(D) The agency shall post at the appropriate site in the Israel Contracting Center copies of the attached notice. Copies of the notice, after being signed by the agency's duly authorized representative, shall be post-

ed by the agency within thirty (30) calendar days of the date this decision becomes final, and shall remain posted for sixty (60) consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer at the address cited in the paragraph entitled "Implementation of the Commission's Decision," within ten (10) calendar days of the expiration of the posting period.

(E) The agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation of the agency's calculation of back pay and other benefits due appellant, including evidence that the corrective action has been implemented. ATTORNEY'S FEES (H1092)

If appellant has been represented by an attorney (as defined by 29 C.F.R. §1614.501 (e)(1)(iii)), he/she is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. §1614.501 (e). The award of attorney's fees shall be paid by the agency. The attorney shall submit a verified statement of fees to the agency -- not to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of this decision becoming final. The agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. §1614.501.

<2> Appellant shall cooperate in the agency's efforts to compute the amount of backpay and benefits due, and shall provide all relevant information requested by the agency. If there is a dispute regarding the exact amount of backpay and/or benefits, the agency shall issue a check to appellant for the undisputed amount within sixty (60) calendar days of the date the agency determines the amount it believes to be due. Appellant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision."

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0595)

Compliance with the Commission's corrective action is mandatory. The agency shall submit its compliance report within thirty (30) calendar days of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. The agency's report must contain supporting documentation, and the agency must send a copy of all submissions to appellant. If the agency does not comply with the Commission's order, appellant may petition the Commission for enforcement of the order. 29 C.F.R. §1614.503 (a). Appellant also has the right to file a civil action to enforce compliance

with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.408, 1614.409, and 1614.503 (g). Alternatively, appellant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File A Civil Action." 29 C.F.R. §§ 1614.408 and 1614.409. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. §2000e-16 (Supp. V 1993). If appellant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated. See 29 C.F.R. §1614.410.

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M0795)

The Commission may, in its discretion, reconsider the decision in this case if appellant or the agency submits a written request containing arguments or evidence which tend to establish that:

1. New and material evidence is available that was not readily available when the previous decision was issued; or
2. The previous decision involved an erroneous interpretation of law, regulation or material fact, or misapplication of established policy; or
3. The decision is of such exceptional nature as to have substantial precedential implications.

Requests to reconsider, with supporting arguments or evidence, MUST BE FILED WITHIN THIRTY (30) CALENDAR DAYS of the date you receive this decision, or WITHIN TWENTY (20) CALENDAR DAYS of the date you receive a timely request to reconsider filed by another party. Any argument in opposition to the request to reconsider or cross request to reconsider MUST be submitted to the Commission and to the requesting party WITHIN TWENTY (20) CALENDAR DAYS of the date you receive the request to reconsider. See 29 C.F.R. § 1614.407. All requests and arguments must bear proof of postmark and be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. In the absence of a legible postmark, the request to reconsider shall be deemed filed on the date it is received by the Commission.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely. If extenuating circumstances have prevented the timely filing of a request for reconsideration, a written statement setting forth the circumstances which caused the delay and any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

RIGHT TO FILE A CIVIL ACTION (T/A0993)

This is a decision requiring the agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court. It is the position of the Commission that you have the right to file a civil action in an appropriate United States District Court WITHIN NINETY (90) CALENDAR DAYS from the date that you receive this decision. You should be aware, however, that courts in some jurisdictions have interpreted the Civil Rights Act of 1991 in a manner suggesting that a civil action must be filed WITHIN THIRTY (30) CALENDAR DAYS from the date that you receive this decision. To ensure that your civil action is considered timely, you are advised to file it WITHIN THIRTY (30) CALENDAR DAYS from the date that you receive this decision or to consult an attorney concerning the applicable time period in the jurisdiction in which your action would be filed. In the alternative, you may file a civil action AFTER ONE HUNDRED AND EIGHTY (180) CALENDAR DAYS of the date you filed your complaint with the agency, or filed your appeal with the Commission. If you file a civil action, YOU MUST NAME AS THE DEFENDANT IN THE COMPLAINT THE PERSON WHO IS THE OFFICIAL AGENCY HEAD OR DEPARTMENT HEAD, IDENTIFYING THAT PERSON BY HIS OR HER FULL NAME AND OFFICIAL TITLE. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work.

Filing a civil action will terminate the administrative processing of your complaint.

RIGHT TO REQUEST COUNSEL (Z1092)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above
("Right to File A Civil Action").

FOR THE COMMISSION:
Dec 22, 1998
DATE Ronnie Blumenthal, Director
Office of Federal Operations
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, An Agency of the United States Government

This Notice is posted pursuant to an Order by the United States Equal Employment Opportunity Commission dated_____ which found that a

violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq., has occurred at this facility.

Federal law requires that there be no discrimination against any employee or applicant for employment because of the person's RACE, COLOR, RELIGION, SEX, NATIONAL ORIGIN, AGE, or PHYSICAL or MENTAL DISABILITY with respect to hiring, firing, promotion, compensation, or other terms, conditions or privileges of employment.

The U.S. Army's Israel Contracting Center (hereinafter, the facility) supports and will comply with such Federal law and will not take action against individuals because they have exercised their rights under law.

The facility has been found to have violated Title VII by not selecting an individual for a position because of his religious beliefs.

The facility has been ordered to place this individual in a comparable position. The facility will not in any manner restrain, interfere, coerce, or retaliate against any individual who exercises his or her right to oppose practices made unlawful by, or who participates in proceedings pursuant to, Federal equal employment opportunity law.

Date Posted: _____

Posting Expires: _____

1 The agency also addressed appellant's reprisal claim which was unaddressed in the AJ's findings. The agency found that, since appellant failed to show that management was aware of his previous EEO complaints, he failed to establish a prima facie case of reprisal. After reviewing the record, we affirm the agency's conclusion and find that the evidence does not show that the SO was aware of appellant's prior EEO activity when he decided not to select appellant for the position.

2 Appellant requests that the agency compensate him for back pay at the GS-13 grade level because if he had been selected for the position in 1990 he would have retained his grade level. However, the AJ determined that the evidence was insufficient to make this determination. Therefore, the AJ recommended that issue be remanded to the agency to determine if appellant would have been entitled to a grade retention. The Commission agrees with the AJ in that the evidence is insufficient to resolve the grade retention issue on appeal.

As for compensatory damages mentioned in the AJ's RD, the underlying nonselection in question clearly occurred in 1990, before the Civil Rights Act of 1991 made such damages available for acts of discrimination postdating November 21, 1991. See Landgraf v. USI Film Products, 511 U.S. 244 (1994); and Laverdure v. Department of the Interior, EEOC Request No. 05931186 (June 16, 1994).

OFO Decision April 11, 2000,

Stan Laber v. Department of the Army
05990372
April 11, 2000

Stan Laber,
Complainant, Request No. 05990372
Appeal No. 01973838
Louis Caldera, Agency No. 0793061E
Secretary,
Department of the Army, Hearing No. 100-94-7118X,
Agency.

DECISION ON REQUEST FOR RECONSIDERATION

The complainant initiated a request to the Equal Employment Opportunity Commission (EEOC or Commission) to reconsider the decision in Stan Laber v. Department of the Army, EEOC Appeal No. 01973838 (December 22, 1998).

<1> EEOC Regulations provide that the Commission may, in its discretion, reconsider any previous Commission decision where the requesting party demonstrates that: (1) the appellate decision involved a clearly erroneous interpretation of material fact or law; or (2) the appellate decision will have a substantial impact on the policies, practices, or operations of the agency. See 64 Fed. Reg. 37,644, 37,659 (1999) (to

be codified and hereinafter referred to as 29 C.F.R. § 1614.405(b)). For the reasons set forth herein, complainant's request is denied. In the previous decision, the Commission affirmed the Administrative Judge's finding of discrimination in this matter. The Administrative Judge (AJ) had found that complainant was subject to unlawful religious discrimination when he was not selected for the position of Industrial Specialist, GS-1150-11. The position was located in Tel Aviv, Israel.

To remedy the established discrimination, the Commission ordered the agency to offer complainant immediate placement in an Industrial Specialist GS-11 position in Israel, or a substantially equivalent position even if such position is at a GS-12 or 13 level providing that complainant was qualified for such position.

On request for reconsideration, complainant contends that the Commission's remedy order was insufficient. Complainant first states that the order failed to provide him with return rights after the completion of his assignment. Complainant explains that this provision was a part of the AJ's recommended remedy and a benefit that he would have received but for the discrimination. Additionally, complainant contends that the order failed to provide for grade retention upon return as described in the AJ's recommended remedy. Complainant also asserts that the Commission unnecessary restricted his opportunity to obtain a position in Israel by limiting the agency's inquiry to an Industrial Specialist or equivalent position.

Last, complainant requests that the Commission make the following revisions to the order: (1) require the agency to comply with 29 C.F.R. § 1614.501(b); (2) state that the duration of the assignment shall be five years; (3) reduce the time allowed for the agency to determine backpay, interest, and other benefits; (4) state that for the purposes of calculating backpay the discrimination occurred in 1989; and (5) take official notice of overseas benefits, entitlements and other considerations provided under DOD Directive 1400.25. The agency did not file a response to complainant's request for reconsideration.

After a review of complainant's request to reconsider, the previous decision, and the entire record, the Commission finds that the request fails to meet the criteria of 29 C.F.R. §1614.405(b), and it is the decision of the Commission to deny the request. The decision in EEOC Appeal No. 01973838 (December 22, 1998) remains the Commission's final decision. Considering complainant's request for reconsideration, we find that the concerns raised are speculative and anticipate noncompliance by the agency. The previous decision directed the agency to place complainant into the position he would have filled but for discrimination and also to provide him with "other benefits" denied due to the discrimination. The agency shall comply with the ORDER in the previous decision, as reprinted below. If complainant believes that the agency has not complied with the ORDER, he can file a "petition for enforcement" with the Commission at the appropriate time. See 29 C.F.R. § 1614.503(a). There is no further

right of administrative appeal on the decision of the Commission on this request for reconsideration.

ORDER (D1199)

The agency is ORDERED to take the following remedial action:

(A) Within thirty (30) calendar days of the date this decision becomes final, the agency is directed to offer complainant immediate placement in an Industrial Specialist GS-11 position in Israel, or a substantially equivalent position even if such position is at a GS-12 or 13 level providing that complainant is qualified for such position.

(B) The agency shall determine if complainant is due any back pay, interest and other benefits, pursuant to 29 C.F.R. §1614.501, no later than sixty (60) calendar days after the date this decision becomes final. In conjunction with its back pay determination, the agency shall determine if complainant would have been entitled to retain pay at the GS-13 level, if he had been selected in 1990.

<2> Complainant shall cooperate in the agency's efforts to compute the amount of back pay and benefits due, and shall provide all relevant information requested by the agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the agency shall issue a check to complainant for the undisputed amount within sixty (60) calendar days of the date the agency determines the amount it believes to be due. Complainant may petition for enforcement or

clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision."

(C) The agency shall provide training in the obligations and duties imposed by the Title VII to the management officials responsible for the actions at issue.

(D) The agency shall post at the appropriate site in the Israel Contracting Center copies of the attached notice. Copies of the notice, after being signed by the agency's duly authorized representative, shall be posted by the agency within thirty (30) calendar days of the date this decision becomes final, and shall remain posted for sixty (60) consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer at the address cited in the paragraph entitled "Implementation of the Commission's Decision," within ten (10) calendar days of the expiration of the posting period.

(E) The agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation of the agency's calculation of back pay and other benefits due complainant, including evi-

dence that the corrective action has been mented. ATTORNEY'S FEES (H1199)

If complainant has been represented by an attorney (as defined by 64 Fed. Reg. 37,644, 37,659-60 (1999) (to be codified and hereinafter referred to as 29 C.F.R. § 1614.501(e)(1)(iii)), he/she is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the agency. The attorney shall submit a verified statement of fees to the agency -- not to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of this decision becoming final. The agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.IMPLEMENTATION OF THE COMMISSION'S DECISION (K1199) Compliance with the Commission's corrective action is mandatory. The agency shall submit its compliance report within thirty (30) calendar days of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. The agency's report must contain supporting documentation, and the agency must send a copy of all submissions to the complainant. If the agency does not comply with the Commission's order, the complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 64 Fed. Reg.

37,644, 37,659-60 (1999) (to be codified and hereinafter referred to as 29 C.F.R. §§ 1614.407, 1614.408), and 29 C.F.R. § 1614.503(g). Alternatively, the complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File A Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. § 2000e-16(c)(Supp. V 1993). If the complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated. See 64 Fed. Reg. 37,644, 37,659 (1999) (to be codified and hereinafter referred to as 29 C.F.R.§1614.409). COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (P1199)

This decision of the Commission is final, and there is no further right of administrative appeal from the Commission's decision. You have the right to file a civil action in an appropriate United States District Court WITHIN NINETY (90) CALENDAR DAYS from the date that you receive this decision. If you file a civil action, YOU MUST NAME AS THE DEFENDANT IN THE COMPLAINT THE PERSON WHO IS THE OFFICIAL AGENCY HEAD OR DEPARTMENT HEAD, IDENTIFYING THAT PERSON BY HIS OR HER FULL NAME AND OFFICIAL TITLE. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work.

RIGHT TO REQUEST COUNSEL (Z1199)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

FOR THE COMMISSION:

April 11, 2000 Date Carlton M. Hadden, Acting Director, Office of Federal Operations

CERTIFICATE OF MAILING

For timeliness purposes, the Commission will presume that this decision was received within five (5) calendar days after it was mailed. I certify that this decision was mailed to complainant, complainant's representative (if applicable), and the agency on: Date Equal Opportunity Assistant

1 On November 9, 1999, revised regulations governing the EEOC's federal sector complaint process went into effect. These regulations apply to all federal sector EEO complaints pending at any stage in the

administrative process. Consequently, the Commission will apply the revised regulations found at 64 Fed. Reg. 37,644 (1999), where applicable, in deciding the present appeal. The regulations, as amended, may also be found at the Commission's website at www.eeoc.gov.

2 Complainant requests that the agency compensate him for back pay at the GS-13 grade level because if he had been selected for the position in 1990, he would have retained his grade level. However, the AJ determined that the evidence was insufficient to make this determination. Therefore, the AJ recommended that issue be remanded to the agency to determine if complainant would have been entitled to a grade retention. The Commission agrees with the AJ in that the evidence is insufficient to resolve the grade retention issue and orders the agency to determine if complainant would have been entitled to pay retention if selected for the Industrial Specialist position in 1990.

OFO Decision January 23, 2002

04A00020, January 23, 2002, Stan Laber v. Department of the Army

Stan Laber, Petitioner,

v.

Thomas E. White, Secretary, Department of the Army, Agency.

Petition No. 04A00020
Appeal No. 01973838
Agency No. 0793061E
Hearing No. 100-94-7118X

DECISION ON A PETITION FOR ENFORCEMENT

On July 10, 2000, the Equal Employment Opportunity Commission (EEOCor Commission) docketed a petition for enforcement to examine the enforcement of an order set forth in Stan Laber v. Department of the Army, EEOC Appeal No. 01973838 (December 22, 1998). This petition for enforcement is accepted by the Commission pursuant to 29 C.F.R. § 1614.503. Petitioner alleged that the agency failed to fully comply with the Commission's order in that decision.

In its previous decision, the Commission had affirmed an earlier finding by an EEOC Administrative Judge (AJ) that petitioner had been discriminated against on the basis of religion when he was not selected for the position of Industrial Specialist, GS-

1150-11, in Tel Aviv, Israel. The Commission directed the agency to accomplish the following:

Within thirty (30) days of the date the Commission's decision became final, the agency must offer petitioner immediate placement in an Industrial Specialist GS-11 position in Israel, or a substantially equivalent position even if such position is at a GS-12 or GS-13 level, providing that petitioner is qualified for such position, and award him appropriate back pay, interest, and benefits.

The matter was assigned to a Compliance Officer and docketed as Compliance No. 06A01000 on April 17, 2000.

<1>

On May 16, 2000, the agency submitted its initial compliance report. Petitioner contacted the Compliance Officer on May 26, 2000, indicating that he wished to file a petition for enforcement. In accordance with petitioner's request, the instant petition was docketed on July 10, 2000. By his letter dated July 19, 2000, petitioner stated that he had accepted the agency's offer of employment in Germany with no conditions regarding placement in Israel or elsewhere. Petitioner withdrew that portion of his petition for enforcement which claimed that the agency's offer of employment was deficient because the location was not Israel, and requested that his petition be modified accordingly. The record before us contains the appellate case file, the compliance file and further documents from the agency and petitioner. In a final (330-day) compliance report dated March 12, 2001, the

agency contends that it has complied with the provision of the Order relating to the agency's job offer, as petitioner unconditionally accepted an agency-offered GS-11 position in Germany, and he has been working in that position since October 2000. The agency also stated that it had complied with the provisions of the Order regarding training, posting of the discrimination notice and payment of attorney's fees and costs. The agency's final compliance report stated that it had not yet complied with the provision of the Order relating to payment of back pay and allowances, as petitioner has a petition for enforcement pending on that issue.

Petitioner has submitted comments in numerous letters including those dated June 21, 2000, July 31, 2000, March 16, 2001 and July 18, 2001. In a submission dated July 18, 2001, petitioner stated that the agency's offer of employment in Germany was made in bad faith, based on its submission that the agency had no positions in Israel. Petitioner alleged that on June 15, 2001, he became aware of the existence of an agency office in Israel when he found a job announcement for a position with the agency in Tel Aviv, Israel. Petitioner asserts that based on this information, this office existed in April of 2000 when the agency claimed that it had no offices in Israel, and thus, the agency should change the location of his position to Israel. Petitioner also asserts that the position in Germany is not at a GS-12 or GS-13 level as ordered by the Commission, there are no return rights as ordered by the Administrative Judge and the date of the position in

Germany is not retroactive to the date he would have begun the position in Israel.

We will now review each of the elements in the previous decision's order to determine whether further action is necessary.

Paragraph (A): Placement in an Industrial Specialist GS-11 position in Israel, or a substantially equivalent position

The Commission finds that petitioner urged the Commission to exclude the issue of location from his petition for enforcement upon his acceptance of the position in Germany. As petitioner has proffered no evidence that the office in Israel at issue contained any Industrial Specialist positions or other positions for which he was qualified, we find that the agency has complied with Paragraph (A) of our Order regarding the position itself. In so finding, we note that the Commission's Order only specified that petitioner should be placed in a GS-12 or GS-13 position if a GS-11 Industrial Specialist position was not available.

Moreover, while petitioner alleges that the new position in Germany is not similar to the original position as it has no promotion potential, the record is devoid of evidence establishing that the position in Israel had superior promotion potential. Finally, while petitioner has alleged that the agency has not indicated whether the new position in Germany is a limited or unlimited tour, we note that the agency, in its May 22, 2000 offer of employment to petitioner,

stated that the position was limited to a three (3) year tour with a two (2) year extension at management's discretion, as Department of Defense policy regarding overseas employment for civilian employees limits overseas tours to five years. Further, while not specifically stated in the Commission's Order, as found by the Administrative Judge, we direct the agency to provide return rights to petitioner's position with the Defense Logistics Agency upon completion of petitioner's current assignment in Germany.

Paragraph (B): Back Pay, Interest, and Benefits

On June 30, 2000, the agency submitted its decision to the Office of Federal Operations regarding back pay with documentation supporting its conclusions. Specifically, the agency found that petitioner was not entitled to back pay as he was in continuous federal employment at a higher grade than he would have been at had be been selected for the position in Israel. In so finding, the agency stated that the Industrial Specialist position in Israel for which petitioner was not selected was at the GS-11 level, while petitioner held a GS-13 position at the time he applied for the Industrial Specialist position and thereafter until he accepted the position in Germany. The agency further found that petitioner was not entitled to overseas expenses or living quarters allowances (LQA) for which he sought payment. Regarding overseas expenses, the agency found that petitioner was not entitled to payment as he did not incur the overseas expenses and had no entitlement to allowances at the time of the discrimination. In so finding, the agency stated that

its regulations did not permit payment for entitlements which were never lost and overseas allowances are payable only for actual overseas expenses incurred.

Petitioner raised several objections to the agency's methodology. He stated that: (1) he was employed at the GS-13 level at the time he applied for the position at issue; (2) he served in a GS-11 position in 1994 and 1995; (3) the agency did not consider step increases at the GS-11, step 00 level (identical to GS-13, step 3) that he would have received until June 1994 at least; and (4) that amounts for living quarters allowances and Sunday premium pay were ignored or inadequately discussed.

The Commission finds that the agency's compliance report does not address several issues raised by petitioner, nor can the Commission determine if certain items should be afforded to petitioner. Initially, we find that the agency's report does not specifically address whether petitioner did in fact serve in a GS-11 position in 1994 and 1995, or whether the agency considered any step increases at the GS-11, step 00 level which petitioner would have received until June 1994 at the earliest. Such a determination of petitioner's earnings could impact the agency's finding regarding whether petitioner is entitled to back pay for the period after he was not selected for the position at issue. In addition, we find that the agency's compliance report did not consider or address whether petitioner was entitled to overtime, compensatory time and other benefits such as Sunday premium pay in determining

that petitioner was not entitled to back pay. Finally, for purposes of computation of possible back pay, interest and benefits, we find that petitioner would have started the position in Israel no earlier than March 1, 1990, the date the position in Israel petitioner was denied was authorized by the agency, rather than the start date of December 31, 1989 proffered by petitioner.

However, we do not adopt petitioner's objections to the agency's calculations on several points. Initially, we agree with the agency's findings that petitioner was a GS-12 Step 10 both before and after the selection date of July 30, 1990, thus he was not a GS-13 at the time he applied for the position in question. In addition, we agree with the agency's finding that petitioner is not entitled to living quarters allowances. As found by the agency, living quarters allowances cannot be paid to petitioner as he did not incur expenses and had no entitlement to the allowances at the time of the adverse action. The agency correctly found that make whole remedy principles do not include payment for entitlements that were never lost. Nevertheless, we will direct the agency to conduct a supplemental investigation that responds to several of petitioner's concerns, and issue a supplemental report to petitioner and the Commission's Compliance Office.

CONCLUSION

Based upon a review of the record, the Commission grants the petition for enforcement of the Order in Stan Laber v. Department of the Army EEOC Appeal

No. 01973838 (December 22, 1998), in part. The agency is directed to comply with the order below.

ORDER

Within thirty (30) days of the date this decision becomes final, the agency is directed to take the following actions:

I. With regard to Paragraph A of the Order in EEOC Appeal No. 01964367 (Placement in GS-11 Industrial Specialist position in Israel), we direct the agency to provide petitioner return rights to his position with the Defense Logistics Agency upon his completion of his current assignment in Germany, and also provide that the date for computation of benefits is made retroactive to the date he would have begun the position in Israel, which shall be determined by the agency to be no earlier than March 1, 1990 but no later than July 30, 1990.

II. With regard to Paragraph B of the Order in EEOC Appeal No. 01964367 (Back Pay, Interest, and Benefits), the agency is directed to conduct a supplemental investigation on the subject of back pay, addressing the following and providing a full explanation with regard to its denial of back pay to petitioner, including, but not limited to:

(a) the methodology used to establish petitioner's earnings after he was not selected for the position at issue; and

(b) whether amounts for overtime, compensatory time and other benefits such as Sunday premium pay

were included in the determination that petitioner was not entitled to back pay.

II. The agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation for the items listed, above, including the agency's calculation of interest and other payments and benefits due petitioner and a copy of the final agency decision with regard to petitioner's claim for compensatory damages.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0900)

Compliance with the Commission's corrective action is mandatory. The agency shall submit its compliance report within thirty (30) calendar days of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. The agency's report must contain supporting documentation, and the agency must send a copy of all submissions to the petitioner. If the agency does not comply with the Commission's order, the petitioner may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The petitioner also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the petitioner has the right to file a civil

action on the underlying complaint in accordance with the paragraph below entitled "Right to File A Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. § 2000e- 16(c)(Supp. V 1993). If the petitioner files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated. See 29 C.F.R. § 1614.409.

STATEMENT OF PETITIONER'S RIGHTS - ON PETITION FOR ENFORCEMENT PETITIONER'S RIGHT TO FILE A CIVIL ACTION (R0900)

This is a decision requiring the agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court within ninety (90) calendar days from the date that you receive this decision. In the alternative, you may file a civil action after one hundred and eighty (180) calendar days of the date you filed your complaint with the agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. Filing a civil action will terminate the administrative processing of your complaint.

RIGHT TO REQUEST COUNSEL (Z1199)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

FOR THE COMMISSION:
Carlton M. Hadden, Director
Office of Federal Operations

January 23, 2002
Date

CERTIFICATE OF MAILING

For timeliness purposes, the Commission will presume that this decision was received within five (5) calendar days after it was mailed. I certify that this decision was mailed to complainant, complainant's representative (if applicable), and the agency on:

Date
Equal Opportunity Assistant

1 Petitioner filed a request for reconsideration with the Commission, contending that the Commission's remedy order was insufficient. In its decision on request for reconsideration, the Commission denied petitioner's request and found that the decision in EEOC Appeal No. 01973838 remained the Commission's final decision. Considering petitioner's request, we found that the concerns raised over the agency's noncompliance were speculative and anticipated noncompliance. In so stating, however, the Commission ordered agency to comply with the ORDER in the previous decision directing the agency to place petitioner in the position he would have filled but for the discrimination and also to provide him with "other benefits" denied due to the discrimination. See Stan Laber v. Department of the Army, EEOC Request No. 05990372

(April 10, 2000).

OFO Decision March 10, 2003

Stan Laber v. Department of the Army
04A20013 March 10, 2003
Stan Laber,
Petitioner,
v.
Thomas E. White, Secretary, Department of the Army,
Agency.

Petition No. 04A20013

Request No. 05990372
Appeal No. 01973838
Hearing No. 100-94-7118X
Agency No. 0793061E

DECISION ON A PETITION FOR CLARIFICATION

On March 5, 2002, the Equal Employment Opportunity Commission docketed a petition for clarification to examine an order set forth in Stan Laber v. Department of the Army, EEOC Petition No. 04A00020 (January 23, 2002). This petition for clarification is accepted by the Commission pursuant to 29 C.F.R. § 1614.503.

In its decisions set forth in Stan Laber v. Department of the Army, EEOC Appeal No. 01973838 (December 22, 1998) request for reconsideration denied, EEOC Request No. 05990372 (April 10, 2000)

<1> the Commission affirmed a finding by an EEOC Administrative Judge that petitioner had been discriminated against on the basis of religion when he was not selected for the position of Industrial Specialist, GS-1150-11,in Tel Aviv, Israel. The Commission ordered the agency to accomplish the following:

Within thirty (30) days of the date the Commission's decision became final, the agency must offer petitioner immediate placement in an Industrial Specialist GS-11 position in Israel, or a substantially equivalent position even if such position is at a GS-12 or GS-13 level, providing that petitioner is qualified for such position, and award him appropriate back pay, interest, and other benefits. The matter was then assigned to a Compliance Officer and docketed as Compliance No. 06A01000 on April 17, 2000. On May 16, 2000, the agency submitted its initial compliance report. Petitioner contacted the Compliance Officer on May 26, 2000, indicating that he wished to file a petition for enforcement. In accordance with petitioner's request, the petition was docketed on July 10, 2000. By his letter dated July 19, 2000, petitioner stated that he had accepted the agency's offer of employment in Germany with no conditions regarding placement in Israel or elsewhere. Petitioner withdrew that portion of his petition for enforcement which claimed that the agency's offer of employment was deficient because the location was not Israel, and requested that his petition be modified accordingly. In a final (330-day) compliance report dated March 12, 2001, the agency contends that it has complied with the provision of the Order relating to the agency's job

offer, as petitioner unconditionally accepted an agency-offered GS-11 position in Germany, and he has been working in that position since October 2000. The agency also stated that it had complied with the provisions of the Order regarding training, posting of the discrimination notice and payment of attorney's fees and costs. The agency's final compliance report stated that it had not yet complied with the provision of the Order relating to payment of back pay and allowances.

In Stan Laber v. Department of the Army, EEOC Petition No. 04A00020 (Jan. 23, 2002), the Commission directed the agency to accomplish the following:

1. With regard to Paragraph A of the Order in EEOC Request No. 05990372 (Placement in GS-11 Industrial Specialist position in Israel), we direct the agency to provide petitioner return rights to his position with the Defense Logistics Agency upon his completion of his current assignment in Germany, and also provide that the date for computation of benefits is made retroactive to the date he would have begun the position in Israel, which shall be determined by the agency to be no earlier than March 1, 1990 but no later than July 30, 1990; and

2. With regard to Paragraph B of the Order in EEOC Request No. 05990372 (Back Pay, Interest, and Benefits), the agency is directed to conduct a supplemental investigation on the subject of back pay, addressing the following and providing a full explanation with regard to its denial of back pay to

petitioner, including, but not limited to: (a) the methodology used to establish petitioner's earnings after he was not selected for the position at issue; and (b) whether amounts for overtime, compensatory time and other benefits such as Sunday premium pay were included in the determination that petitioner was not entitled to back pay.

On February 26, 2002, the agency responded. The agency contended that it has no authority to provide return rights to petitioner's former position with the Defense Logistics Agency (DLA) or with the Defense Contract Management Agency (DCMA) upon completion of his current position with the agency in Germany. The agency contended that it had no legal authority to impose the remedy of return rights on either the DLA or the DCMA, as these agencies were not parties to the complaint, nor did they have any involvement in the case. Further, the agency alleges that it was incumbent on petitioner to negotiate a return rights agreement to either the DLA or DCMA if he wanted to return after his overseas assignment, but he failed to do so. In response, petitioner filed the instant petition requesting clarification as to whether he was entitled to return rights. In its March 29, 2002 response, the agency contended that it is in full compliance.<2>

Initially, we address the parties' contentions regarding the issue of return rights.<3> In EEOC Petition 04A00020, the Commission determined that in order to remedy the discrimination by the agency in 1990, the agency must provide petitioner with return

rights to a position with the DLA, petitioner's former employer, upon completion of his then-current assignment with the agency in Germany. We did not find that petitioner would have been eligible for a return to the DLA through the DOD's Priority Placement Program (PPP), as there was no evidence to suggest that this eligibility was available to petitioner in 1990.<4>

However, after consideration of the agency's response to the instant petition for clarification, we agree with the agency that there is insufficient evidence in the record to find that had petitioner been offered the position in Israel in 1990, he would have been given return rights to a position with the DLA. As stated by the agency, return rights were to be determined between petitioner and the DLA prior to his leaving employment with that agency. The evidence suggests that if petitioner sought return rights to the DLA or another DOD agency, he was obligated to negotiate a return rights agreement with the DOD or DLA prior to accepting employment with the Department of the Army, which he did not do. In the absence of any documentation of a negotiated return rights agreement between petitioner and the DLA, we cannot find that petitioner is entitled to such rights, and cannot compel the agency to place petitioner in a position with the DLA absent any contrary evidence. In light of the arguments made by the agency, and in the absence of contrary evidence presented by petitioner, the Commission now finds that it was an error to direct the agency to provide petitioner with return rights to his former position with the DLA upon com-

pletion of his assignment in Germany. However, as noted by the agency, upon completion of petitioner's overseas tour with the agency, he will be eligible to be placed in the DOD's PPP, returning him to the PPP region from which he reported for his overseas duty.

<5> Further, upon review, the Commission finds that the agency is in compliance with the Order set forth in Stan Laber v. Department of the Army, EEOC Appeal No. 01973838 (December 22, 1998) request for reconsideration denied, EEOC Request No. 05990372 (April 10, 2000). The Commission finds that the agency provided adequate evidence in its response to petitioner's petition for clarification that it complied with the Commission's order regarding the calculation of any back pay which would have been owed to petitioner. The agency stated in its most recent compliance report that petitioner was not entitled to back pay, as he suffered no loss of base pay due to his non-selection for the position in Israel. The agency stated that the position offered in Israel was a two-year position at the GS-11 level, and petitioner was a GS-12/Step 10 when he applied for the position. The agency then stated that it conducted a pay comparison for the positions and determined that petitioner made $2,381.12 more in base pay at his position with the DLA than he would have made at the GS-11 level in Israel. In addition, the agency stated that as the position in Israel was for only two years and he would not have been employed in Israel beyond 1992, it was impossible for him to ever make more in salary in Israel than he would have in his DLA position. Specifically addressing the Order in Petition No.

04A00020, the agency stated that it considered the issues of overtime, compensatory time and other benefits such as Sunday premium pay, and found that petitioner was entitled to compensation for Sunday premium pay in the amount of $4,883.38, plus interest in the amount of $6,124.55. The agency enclosed a Leave and Earnings statement establishing that petitioner received payment for these amounts on June 13, 2002. The agency then found that petitioner was not entitled to compensation for Post Allowances, premium payment for living in difficult locations or compensatory damages, as the act of discrimination took place in 1990, prior to passage of the Civil Rights Act of 1991.

Based on our review of the record, the Commission grant's petitioner's Petition for Clarification of the Order in Stan Laber v. Department of the Army, EEOC Petition No. 04A00020 (Jan. 23, 2002). For the foregoing reasons, the Order in EEOC Petition No. 04A00020 is no longer in effect. The Commission further finds that the agency has fully complied with the Commission's Order in Stan Laber v. Department of the Army, EEOC Appeal to. 01973838 (December 22, 1998) request for reconsideration denied, EEOC Request No. 05990372 (April 10, 2000).

PETITIONER'S RIGHT TO FILE A CIVIL ACTION (P0900)

This decision of the Commission is final, and there is no further right of administrative appeal from the Commission's decision. You have the right to file a

civil action in an appropriate United States District Court within ninety (90) calendar days from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work.

RIGHT TO REQUEST COUNSEL (Z1199)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.;the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above("Right to File A Civil Action").

FOR THE COMMISSION:
Carlton M. Hadden, Director
Office of Federal Operations

March 10, 2003

Date

CERTIFICATE OF MAILING

For timeliness purposes, the Commission will presume that this decision was received within five (5) calendar days after it was mailed. I certify that this decision was mailed to petitioner, petitioner's representative (if applicable), and the agency on:

Date
Equal Opportunity Assistant

1 In EEOC Request No. 05990372, the Commission found that complainant's concerns about the agency's noncompliance were speculative.

2 The record before us contains the appellate case file, the compliance file and further documents from the agency and petitioner.

3 Return rights can be granted to employees of the Department of Defense (DOD) pursuant to 10 U.S.C § 1586, and state that the Secretary of Defense and the Secretary of each military department "may" establish policies providing for the return of an employee to the grade and position held before acceptance of an assignment outside of the United States. The agency contends that DOD employees must negotiate return rights with their U.S.-based employer before accepting an overseas position, or if the employee does not have return rights at the end of his/her overseas assignment, the employee is enrolled in the DOD Priority Placement Program.

4 The Commission notes that prior to accepting the agency's offered position in Germany in 2000, petitioner was employed with the DCMA in Chicago, Illinois. Thus, petitioner left employment with the DCMA to return to employment with the Department of the Army.

5 We note that the agency offered petitioner a temporary promotion for a period not to exceed four (4) years at an ONOCUS Army activity in Alaska following his assignment in Germany, and petitioner tentatively accepted the agency's offer.

March 12, 2009 Decision of the Court of Appeals for the Fourth Circuit

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 07-1946
STAN LABER,
Plaintiff - Appellant,
v.
PETE GEREN, Secretary of the Army,
Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Gerald Bruce Lee, District Judge. (1:03-cv-00732-GBL)

Argued: January 29, 2009 Decided: March 12, 2009

Before WILLIAMS, Chief Judge, and NIEMEYER and MOTZ, Circuit Judges.

Affirmed by unpublished per curiam opinion.

ARGUED: Jeffrey Howard Greger, LAW OFFICE OF JEFFREY H. GREGER, P.C., Alexandria, Virginia, for Appellant. Leslie Bonner McClendon, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee. ON BRIEF: Chuck Rosenberg, United States Attorney, Ralph Andrew Price, Jr., Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia; Rebecca Ausprung, Litigation Attorney, U.S. ARMY LITIGATION DIVISION, Arlington, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Stan Laber, a civilian Army employee, commenced this Title VII action for religious discrimination against the U.S. Army, challenging the sufficiency of the remedies ordered by the Equal Employment Opportunity Commission's Office of Federal Operations ("OFO"). Laber also alleged retaliation and the failure to accommodate. The district court granted summary judgment to the Army, and, for the reasons herein, we affirm.

I

When this case was before us earlier, see Laber v. Harvey, 438 F.3d 404 (4th Cir. 2006) (en banc), we stated many of the facts relevant to the present appeal:

Laber . . . was employed by the Army as an Operations Research Analyst at Fort Sheridan, Illinois. In mid-1990, motivated in part by his Jewish heritage, Laber applied for a position as a[n] Industrial Specialist in Tel Aviv, Israel. During the job interview, the selecting officer, Leo Sleight, asked Laber if he could be objective when dealing with Jewish contractors. Laber answered affirmatively, but Sleight offered the job to another applicant. Laber filed a formal EEO complaint with the Army alleging that Sleight discriminated against him on the basis of religion in failing to select him for the job. The Army accepted the complaint and, after conducting an internal investigation, concluded that Laber suffered no discrimination. Laber appealed to the OFO.

On December 22, 1998, the OFO reversed and ordered the Army, inter alia, to pay Laber any backpay and benefits for which the Army determined he was eligible and to appoint Laber as an Industrial Specialist in Israel or find a similar position for him. On January 25, 1999, Laber filed a motion for reconsideration, which the OFO denied on April 11, 2000. In May 2000, the Army determined that Laber was entitled to no backpay because his pay at his current job was higher than it would have been had he been working in Israel and that he was entitled to no overseas benefits because he had not actually been overseas. The Army also offered Laber a position as an Industrial Specialist in Germany, contending that it had no similar positions open in Israel. Laber refused the job in Germany and instead filed a petition for enforcement with the OFO, claiming, inter alia, that the Army's backpay and benefits calculations and its job offer were insufficient. Soon thereafter, the Army reoffered Laber the position in Germany, which he accepted, and in doing so, he expressly waived any claim that the Germany position was not compliant with that portion of the OFO's remedial award. He therefore withdrew that portion of his petition for enforcement challenging the Army's Germany job offer.

On January 23, 2002, the OFO issued a decision on the remainder of the petition for enforcement. In relevant part, the OFO determined that the record was unclear with respect to Laber's backpay and benefits arguments, and it required the Army to redetermine whether Laber was entitled to additional backpay and benefits. On or about May 29, 2002, the Army did so

and concluded that Laber was entitled to over $9,000 in additional backpay, but that he was not entitled to receive any overseas benefits. On March 4, 2002, Laber filed a petition for clarification with the OFO, asserting that the Army's benefits and backpay calculations were still deficient. On March 10, 2003, the OFO affirmed that the Army had fully complied with the OFO's December 22, 1998 decision. Id. at 411-12. In that appeal, we held inter alia that "Title VII does not authorize a federal-sector employee to bring a civil action alleging only that the OFO's remedy was insufficient. Rather, in order properly to claim entitlement to a more favorable remedial award, the employee must place the employing agency's discrimination at issue." Id. at 423-24 (footnotes omitted). In recognition of our holding, we remanded the case to allow Laber to amend his complaint. Id. at 429, 432.

On remand, Laber amended his complaint to allege several dozen counts as violations of Title VII. But the magistrate judge allowed only three counts to proceed: Count I for religious "discrimination in connection with the 1990 non-selection" for the position in Israel; Count II for "retaliation in connection with the 1990 non-selection"; and Count III for the Army's failure to make a religious accommodation in furnishing his apartment in Germany. Laber did not object to the magistrate judge's disposition, and with respect to these three counts, the district court granted summary judgment for the Army. From the court's judgment, Laber appeals. We review the district court's grant of summary judgment de novo, construing the facts in the light most favorable to Laber. See Holland v.

Washington Homes, Inc., 487 F.3d 208, 213 (4th Cir. 2007).

II

Count I alleges religious discrimination based on the Army's failure to select Laber for the Israel position in 1990. The district court found these claims barred because Laber did not bring suit in district court within the requisite 90 days of the OFO's "final" decision. See 42 U.S.C. § 2000e-16(c).

Laber contends that the March 10, 2003 decision on his petition for clarification of the Army's compliance with the enforcement order of January 23, 2002, was the relevant final decision, and therefore the present action, filed on June 6, 2003, less than 90 days after the clarification decision, would not be time-barred. The Army contends, on the other hand, that the relevant "final" decision is the April 11, 2000 decision on Laber's request for reconsideration of an earlier final decision dated December 22, 1998, which would make his claim time-barred.

The substance of Laber's claim in Count I is to review the entire OFO decision on his religious discrimination claim and to obtain additional remedies. The relevant decision deciding the merits of Laber's discrimination claims and providing him with remedies was rendered on December 22, 1998. Laber requested reconsideration of that decision, and the decision denying reconsideration was rendered on April 11, 2000. Even though the request for reconsideration extended the date of final decision for purposes

of review, see 29 C.F.R. § 1614.407(c), the December 1998 decision became the final relevant decision, and the decision denying reconsideration so stated: "[The December 22, 1998] decision . . . remains the Commission's final decision." Because Laber did not file this action within 90 days of the December 1998 order, as extended to April 11, 2000, by the request for reconsideration, it is now time-barred.

In an effort to avoid this conclusion, Laber argues that he commenced this action to review the decision of March 10, 2003, rendered by the OFO on Laber's petition for clarification of the Army's compliance with the OFO's enforcement order of January 23, 2002. But the present action does not seek to review the March 10, 2003 decision on the petition for clarification but rather for reconsideration of the merits and for additional remedies. A petition for "clarification cannot change the result of a prior decision or enlarge or diminish the relief ordered." 29 C.F.R. § 1614.503(c). Yet, in this suit Laber not only seeks to "enlarge . . . the relief ordered" but also to put the result of the OFO's December 22, 1998 decision at issue. These two characteristics of the current suit are incompatible with review of the petition for clarification, which only related to the Army's compliance with the OFO's January 23, 2002, decision. Because Laber's present action is not a suit to review the OFO's March 10, 2003 decision on his petition for clarification, the March 10, 2003 decision is not the relevant "final" decision.

Laber argues further that the EEOC's Management Directive 110, Chapter 9, supports his position. That directive states, "If the decision remands the complaint for further agency consideration, the parties retain the rights of appeal and reconsideration with respect to any subsequent decision." He argues that because the OFO, in its enforcement decision of January 23, 2002, directed the Army to take specified remedial steps, he retained the right to appeal the entire case to the federal courts. But this argument fails even if we were to assume that the January 23, 2002 enforcement decision was a "remand" and that a Management Directive could trump clear regulations published in the Code of Federal Regulations. He ignores the sentence directly preceding the one upon which he relies, which reads "The Commission's decision on a request for reconsideration is final, and there is no further right by either party to request reconsideration." (Emphasis added). We conclude that the relevant "final" decision was the OFO's December 22, 1998 decision and the time period within which to review that decision began on April 11, 2000, when the OFO denied Laber's request for reconsideration. Accordingly, this suit is time-barred. See 42 U.S.C. § 2000e-16(c).

Laber argues alternatively that the doctrine of equitable tolling saves his action from failure to file within 90 days, relying largely upon the fact that in 2000, Army personnel took 78 days to calculate his backpay and other elements of his remedy, whereas the OFO order had given the Army only 60 days.

While we do not approve of the Army's late response, it does not support equitable tolling. As the Supreme Court has noted, "Federal courts have typically extended equitable relief only sparingly." Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96 (1990). Only in rare circumstances do we use equitable tolling, which "must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes." Harris v. Hutchinson, 209 F.3d 325, 330 (4th Cir. 2000); see Gayle v. United Parcel Service, Inc., 401 F.3d 222, 226 (4th Cir. 2005). For example, equitable tolling is appropriate "where the claimant has actively pursued his judicial remedies by filing a defective pleading during" the relevant limitations period. Irwin, 498 U.S. at 96. No similar circumstance is presented here. Equitable tolling is also inappropriate in this case because the OFO found for Laber and also found the Army in complete compliance with its remedial order. Cf. Nealon v. Stone, 958 F.2d 584, 587 (4th Cir. 1992). Laber received an overseas appointment in Germany, attorney's fees, and other remedies. And in its March 10, 2003, order the OFO affirmed that the Army "has fully complied with" the OFO's December 22, 1998 decision.

III

In Count II, Laber asserts that the Army retaliated against him by providing him with insufficient remedies. This is simply Count I restated under a different cause of action. Because the 90-day limitation bars Count I, we find that it also bars Count II.

IV

Count III alleges, for the first time, that the Army failed to accommodate Laber's religion in not reimbursing him for his purchase of a new oven for his kitchen in Germany. This claim was not before us at the time of the en banc hearing, but rather was added on remand. Even though it is a new claim, the district court allowed Laber to add this count to his complaint in the interest of judicial economy. Count III stems from events in 2001 in Germany, where Laber moved for his overseas posting with the Army. He lived off-base and chose an apartment with a used but working oven that fit into an odd-shaped space in the kitchen. The Army normally ensures that its overseas civilian employees have access to a functioning oven, albeit not necessarily a brand-new oven. But Laber wrote the Army in an email:

> Although the current oven and range provided by my landlord is operable, my religion requires that I not use it and instead only utilize an oven that has not previously been used. . . . A housing office representative [from the Army] inspected the kitchen on 2/28/01 and advised that the free standing oven normally provided by his office (assuming it were a new oven) cannot be installed because of the physical and technical constraints of the kitchen.

On March 15, 2001, Laber requested that the Army purchase a new oven for him that would fit into the odd-shaped space in his kitchen, but an Army official denied his request, stating there was no funding to do so. Laber "appealed" this lack-of-funding finding to a Colonel. But before he heard back from the Colonel, he went ahead and purchased a new oven, using his own

money. He then sought reimbursement for the purchase. The Army denied the request because Laber did not obtain prior approval for the purchase. Laber then filed the religious discrimination claim in Count III.

To succeed on his claim, Laber must establish a prima facie case: To establish a prima facie religious accommodation claim, a plaintiff must establish that: (1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; (3) he or she was disciplined for failure to comply with the conflicting employment requirement. Chalmers v. Tulon Co. of Richmond, 101 F.3d 1012, 1019 (4th Cir. 1996) (quotation marks and citations omitted) (emphasis added).

Laber provides no evidence that his reimbursement was denied because of his religious belief. The initial request for an oven was denied for lack of funding, and his request for reimbursement was denied because he failed to obtain approval for the purchase. Laber has cited no authority, nor have we independently found any, that would suggest that the Army had "disciplined" Laber for his religious beliefs by failing to reimburse him, when he lacked prior approval. We conclude, therefore, that Laber failed to make a prima facie case.

For the reasons given, the district court properly granted summary judgment in favor of the Army, and its judgment is

AFFIRMED.

May 7, 2009 Circuit Court Denial of Request for Rehearing and rehearing en banc

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FILED: May 7, 2009
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
STAN LABER,
Plaintiff - Appellant
v.
PETE GEREN, Secretary of the Army,
Defendant - Appellee
O R D E R

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Chief Judge Williams, Judge Niemeyer, and Judge Motz.
For the Court /s/ Patricia S. Connor, Clerk

January 23, 23, 2007 District Court Decision Appealed

IN THE UNITED SPATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDER DIVISION

STAN LABER, Plaintiff,

V. CIVIL ACTION NO. 1:03-732

FRANCIS J. HARVEY, Secretary of the Army, Defendant.

MEMORANDUM OPINION

THIS MATTER is before the Court on Defendant's motion for Summary Judgment and plaintiff's Motion for Partial Summary Judgment. Defendant motions for summary judgment on all three Counts of plaintiff's Amended Complaint: (I) Plaintiff's discrimination claim, stemming from multiple alleged non-selections, (II Plaintiff's retaliation claim, and (III): religious accommodation claim, Plaintiff seeks partial summary judgment on Count I of his complaint. The case concerns Plaintiff Stan Laber's employment discrimination claim against the United States Department of the Army on the basis of religion.

The issues before the Court on Defendant's motion for summary judgment are: (1) whether Plaintiff's action is time barred because he failed to file his civil action within ninety (90) days of the final agency decision; (2) whether Plaintiff's action is barred by the doctrine of equitable mootness because Plaintiff accepted an award and was made whole; and (3) whether Plaintiff failed to exhaust administrative readies to accommodate food preparation needs consistent with his religious beliefs before taking remedial action himself. The Court grants summary judgment for the Defendant on all Counts. First, the Court holds that the Defendant's Motion for Summary Judgment as to the Plaintiff's discrimination and retaliation claims is granted because the plaintiff failed to file suit within ninety (90) days of the EEOC final decision; in addition, because the Equal Employment Opportunity Commission ("EEOC") found Defendant in compliance with the final decision, it did not notify the Plaintiff that he had a right to bring a civil action to enforce the remedy or commence *de novo* civil proceedings. In the alternative, the Court holds that Plaintiff's discrimination and retaliation claims are moot because there is no live controversy for the Court to address. Also, the Court holds that plaintiff's discrimination and retaliation claims are barred by the doctrine of equitable mootness because the remedy has already been fully implemented. Second, the Court holds that the Defendant's Motion for Summary Judgment regarding the Plaintiff's religious accommodations claim is granted because even if plaintiff established a *prima facie* religious accommodation

claim. Plaintiff failed to exhaust his administrative remedies before he took remedial action himself.

The issues before the Court on Plaintiff's motion for partial summary judgment on Count I, his discrimination claim, will not be addressed because they are mooted by the Court's grant of summary judgment for the Defendant on all Counts.

I. Background

A. Discrimination and Retaliation Claims

This case concerns plaintiff Mr. Stan Laber's employment discrimination and retaliation claims against Defendant Department of the Army ("Army") on the basis of religion. Plaintiff Mr. Stan Laber was a Contract Specialist with the Army. Plaintiff applied for a position in Israel and claims that he was denied this position in 1990 on the basis of his religious beliefs: Judaism. Plaintiff's Amended Complaint After Remand ("AC") at @@ 19, 22-25, *Laber v. Harvey*, No. 1:03cv732 (E.D. Va. 2003) (No. 67). Plaintiff filed a Complaint with the Equal Employment Opportunity Commission ("EEO" or "EEOC") for discrimination and retaliation for prior EEO complaints. The Department of the Army found that Plaintiff was not discriminated against.

Plaintiff requested a hearing before an administrative judge, alleging both "unlawful discrimination on the basis of his religion, Jewish, and in reprisal for previous EEO activity when he was

not hired by the United States Department of the Army for a position in Tel Aviv, Israel." Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment ("Opposition") at Exh. 1, *Laber v. Harvey*, No. 1:03cv732 (E.D. Va. 2003) (No. 100). On January 7, 1997, the administrative judge issued a decision that religious discrimination motivated the 1990 non-selection. Id. The Army rejected the Administrative Judge's conclusion in its March 4, 1997 Final Agency Decision. Plaintiff appealed this decision to the EEOC Office of Federal Operations ("OFO"). The

OFO affirmed the administrative judge's Decision on December 22, 1998 and ordered Defendant to take remedial action. Id. at Exh. 2. Plaintiff filed a request for reconsideration, claiming the remedy was insufficient. On April 11, 2000, the OFO denied Plaintiff's request for reconsideration, declaring that the decision rendered on December 22, 1998 was the final decision. Id. at Exh. 3.

On July 10, 2000, Plaintiff filed a Petition for Enforcement; he alleged that Defendant failed to comply with the OFO's Order. The OFO issued a decision on the Petition for Enforcement on January 23, 2002 that directed Defendant to provide "return rights" and to complete a supplemental investigation on the issues in dispute regarding back pay. Id. At Exh. 7. Defendant responded that it did not have the authority to provide return rights. Plaintiff then filed a Petition for Clarification. In its decision rendered March 10, 2003, the Commission found that Defendant was in compliance with the final decision remedial

award. Id. at Exh. 9. However, the Commission stated that Defendant did not have the authority to provide return rights; therefore, it was in error to direct the Army to provide return rights. Id. On June 6, 2003, Plaintiff filed a complaint in this Court, the United States District Court for the Eastern District of Virginia.

On June 2, 2004, this Court granted Defendant's Motion for Summary Judgment based on plaintiff' s failure to put the underlying issue of discrimination in his Complaint; also, this Court denied Plaintiff's Motion for reconsideration and Motion to Amend. Plaintiff appealed to the Fourth Circuit on September 3, 2004. The Fourth Circuit, en banc, held on April 11, 2006 that a federal employee who prevails in the administrative process on the issue of liability but is dissatisfied with the remedial award, must place the underlying finding of discrimination at issue in order to claim a more favorable remedy in district court. *Laber v. Harvey*, 438 F.3d 404 (4th Cir. 2006). In addition, the Fourth Circuit held that the District Court improperly denied Plaintiff's Motion to Amend and remanded.

On remand, Magistrate Judge Jones granted Plaintiff's Motion to Amend his complaint on August 3, 2006, but stated that it had to be narrowly tailored to add only one Count for the underlying discrimination for the 1990 non-selection, and one Count for retaliation in connection with that non-selection. Order, *Laber v. Harvey* (No.66). Judge Jones also allowed Plaintiff to include the accommodation claim in the

interests of efficiency. Id. Defendant now moves for summary judgment, arguing that Plaintiff's claims are time barred or should be dismissed because of equitable mootness.

B. Religious Accommodation Claim

While employed in Germany by the Defendant, Plaintiff made a written request on March 15, 2001 for a new built in oven/range of German size because his religion required that he only use an oven that had not previously been used. Opposition at Exh. 26. In the alternative, he asked to be reimbursed for the purchase of a new oven. Id. Plaintiff indicated that the cost of such an oven would be about $600. Id. On March 30, 2001, the Chief of the United States Army Europe Furnishings Management Office, Mr. Carroll, denied Plaintiff's request, explaining that they provided only stand-alone appliances in private rentals and leased quarters, and the office was not funded to purchase a new built-in oven. Id. at Exh. 29. Although the agency had new stand-alone ovens available, Plaintiff's rental quarters could not accommodate this appliance because of technical and physical restraints. Id. at Exh. 26. On April 18, 2001, Plaintiff appealed his request to Brigadier General Promotable Riley. While his appeal was still pending, and before Riley's office was able to explore alternatives (such as "kosherizing" an oven for Mr. Laber), Plaintiff purchased a new built-in oven on his own on April 23, 2001. Id. at Exh. 30.

After purchasing the built-in oven, Plaintiff asked for reimbursement for the expense. Id. Several Army officials informed Plaintiff that regulations do not permit the United States Government to be obligated to pay an expense that was not previously authorized. Id. Plaintiff then filed an EEO Complaint, claiming that the Army failed to accommodate his religion by failing to provide a new built-in kitchen oven. Plaintiff engaged in full administrative proceedings; these proceedings resulted in a finding that plaintiff failed to state a *prima facie* case of discrimination. Plaintiff then amended his district court complaint to include this claim. This Court allowed this claim to be included in Plaintiff's Amended Complaint in the interests of efficiency. Order, *Laber v. Harvey* (No.66). Defendant moves for Summary Judgment on this claim arguing that Plaintiff fails to establish a *prima facie* case.

II. DISCUSSION

A. Standard of Review

Under Federal Rule of Civil Procedure 56(c), the Court must grant summary judgment if the moving party demonstrates that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). In reviewing a motion for summary judgment, the Court views the facts in a light most favorable to the non-moving party. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1996). Once a motion for summary judgment is properly made and

supported, the opposing party has the burden of showing that a genuine dispute exists. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. *Anderson*, 477 U.S. at 248. A "material fact" is a fact that might affect the outcome of a party's case. See Id. at 248. Whether a fact is considered to be "material" is determined by the substantive law, and "(o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id. at 248. A "genuine" issue concerning a "material" fact arises when the evidence is sufficient to allow a reasonable jury to return a verdict in the nonmoving party's favor. Id. at 248. "Rule 56(e) ... requires the nonmoving party to go beyond the pleadings and by (his) own affidavits, or by the `depositions, answers to interrogatories, and admissions on file,' designate `specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Summary Judgment is appropriate under Rule 56(c) against a party who cannot sufficiently establish the existence of a necessary element to that party's case, which that party will need to prove at trial. Id. at 322.

B. Analysis

1. Untimely filing of claim

> The Court grants Defendant's Motion for Summary Judgment on Plaintiff's discrimination and retaliation claims because Plaintiff failed to file his civil action within ninety (90) days of the final administrative decision. <Fn 2> Generally, a complainant who has filed an individual complaint under Title VII is authorized to file a civil action in an appropriate United States District Court within ninety (90) days of receipt of the Commission's "final" decision on an appeal. 29 C.F.R. § 1614.407(C) 1999). Federal regulations in force during the year 2000 stated that a decision issued by the Office of Federal Complaints, on behalf of the Commission, was considered final within the meaning of 29 C.F.R. § 1614.407, unless the Commission reconsidered the case. 29 C.F.R. § 1614.405 (historical statute, 1999). The regulations (both in 2000 and today) state that complainants may submit petitions to enforce decisions to the Office of Federal Operations if the complainant believes that the agency is not complying with the decision. 29 C.F.R. § 1614.503(a) (1992). "If the agency is found not to be in compliance with the decision, efforts shall he undertaken to obtain compliance." 29 C.F.R. § 1614.503(b).

Any clarifications of prior rulings provided by the OFO do not "change the result of a prior decision or enlarge or diminish the relief ordered but may further explain the meaning or intent of the prior decision." 29 C.F.R. § 1614.503(c). After reviewing the petition for enforcement, if the OFO determines that

the agency at issue is not complying with a prior decision, or the agency failed or refused to submit required reports regarding compliance, the Commission will notify the complainant of

> the right to file a civil action for enforcement of the decision ... and to seek judicial review of the agency's refusal to implement the ordered relief pursuant to the Administrative Procedure Act, 5 U.S.C. 701 et seq. ... and the mandamus statute, 28 U.S.C. 1361, ... or to commence de novo proceedings pursuant to the appropriate statutes.

29 C.F.R. § 1614.503(g).

Here, Plaintiff did not file his civil action on his discrimination and retaliation claims in a timely fashion because he failed to file it within ninety (90) days of the final administrative decision. <Fn3> In addition, the Commission found Defendant in compliance with the final decision, and thus did not notify Plaintiff that he was authorized to file a civil action to enforce the administrative decision or bring a *de novo* suit. The Commission's April 11, 2000 decision on Plaintiff's request for reconsideration denied reconsideration and affirmed the decision in the EEOC Appeal. Opposition at Exh. 3. The decision stated that the EEOC Appeal decision rendered on December 22, 1998 remained the Commission's "final decision." Id. Any petitions to enforce that decision would not toll

the ninety (90) day time period during which a complainant could file a civil, action under 29 C.F.R. § 1614.407(c); indeed, federal regulations are clear that the response to the petition for enforcement would not alter the relief granted, though it could explain the meaning of the final decision. 29 C.F.R. § 1614.407(c). Accordingly, when Mr. Laber's request for reconsideration was denied on April 11, 2000, even though he subsequently filed a petition for enforcement, the ninety (90) day time period during which he could file a civil action under 29 C.F.R. § 1614.407(c) began. Thus, Plaintiff's claims are barred by the statute of limitations because Plaintiff did not file suit until June 2003 which is more than ninety (90) days after April 11, 2000.

The Plaintiff's Amended Complaint and Opposition to Defendant's Motion for Summary Judgment, Plaintiff asserts that the March 10, 2003 decision was the final decision because it was not until that point in time that all of the issues had been finally resolved. However, this argument fails because the March 10, 2003 decision was a decision regarding Defendant's Petition for Clarification, not the *final* Commission decision. As discussed above, the Commission rendered its final decision on April 11, 2000; the two decisions following that final decision (decisions on the Petition for Enforcement and Petition for Clarification) dealt solely with the enforcement of the remedial award set out in the April 11, 2000 final decision. While Plaintiff may have been confused by the statement contained in the March 10, 2003 "Decision on a Petition for Clarification" that he had 90 days in which

to file a civil action from that date, the governing federal regulations (as described above) plainly foreclose such a suit. See Opposition at Exh. 9; *Adcock v. Roche*, 2006 U.S. Dist. LEXIS 27335 (M.D. GA May 9, 2006). Therefore, Plaintiff failed to timely file a claim under 29 C.F.R. § 1614.407(c) because he did not file within 90 days of the April 11, 2000 decision.

Plaintiff argues also that the decision rendered on his Petition for Clarification was the final decision for purposes of 29 C.F.R. § 1614.407(c) because it restricted the previous remedial award. Plaintiff argues that because decisions rendered on Petitions for Clarification cannot restrict the remedial award under the federal regulations, this decision became the final decision because it laid out the final enforceable remedy. However, this argument fails also. Plaintiff unconditionally accepted the position in Germany. When Plaintiff accepted the position in Germany, the Commission eliminated the award requirement that Defendant had to provide Plaintiff a position in Israel. <Fn. 4> Opposition at Exh. 9. Because of the specific position that Plaintiff accepted in Germany, Defendant no longer had the authority to provide return rights to Plaintiff. The decision rendered on the Petition for Clarification simply explained that the award of return rights was no longer an enforceable part of the decision because it was error to direct the agency to provide the Plaintiff with such return rights. *Id.* Therefore, this decision did not alter the remedial award; it merely clarified what was enforceable and confirmed that Defendant had always been in compliance with the award provided in

the final decision. Because the decision rendered on the Petition for Clarification did not alter the Commission's final decision, the April 11, 2000 decision is still the final decision for the purposes of filing a civil action under 29 C.F.R. § 1614.407(c). Therefore, the Court grants Defendant's Motion for Summary Judgment because Plaintiff did not file his Complaint within ninety (90) days of the final decision.

Finally, while plaintiffs are entitled to file civil actions based on 29 C.F.R. § 1614.503(g) to enforce Commission decisions or pursue *de novo* proceedings, as discussed above, plaintiffs can initiate such a civil action only when the Commission finds that the agency is not in compliance with the prior decision. On these facts, the Commission found that the agency was in compliance with the prior, April 11, 2000 decision (upholding, after reconsideration, the December 22, 1998 decision); thus, Plaintiff was not entitled to file a civil action.

In conclusion, the Court grants Defendant's Motion for Summary Judgment on Counts I and II because Plaintiff failed to file his Complaint within ninety (90) days of the final agency decision of April 11, 2000.

2. Mootness

Plaintiff's case is moot because there is no live controversy for the Court to address because Plaintiff failed to take advantage of his opportunity to bring a civil action within the statute of limitations. "To qualify as a case fit for federal-court adjudication, an

actual controversy must be extant at all stages of review." Toms v. Allied Bond & Collection Agency, Inc., 179 F.3d 103, 105 (4th Cir. 1999) (citing Arizonans for Official English v. Arizona, 520 U.S. 43, 67 (1997) (internal quotation marks omitted). Plaintiff had two choices after the agency issued its final decision on Apri.1 11, 2000: (1) he could [sic] filed a de novo civil action on the underlying discrimination claim within ninety (90) days under 29 C.F.R. § 1614.407, or (2) he could petition the agency for enforcement of the remedy or clarification under 29 C.F.R. § 1614.503. Legard v. England, 240 F. Spp. 2d 538, 545 (E.D. Va. 2002) (citing Clegg v. West, 1997 WL 1168697 (E.D. Va. Oct. 20, 1997) (Brinkema, J.) (citing § 1614.503(g)). After the ninety (90) days to file a de novo civil action expired, the Plaintiff had effectively committed himself to only seeking enforcement of the remedy defined by the April 11, 2000 decision through his petition for enforcement of that remedy with the agency. Thus, Plaintiff was bound to accept the award as given unless the agency notified the Plaintiff that because the Army had not appropriately remedied the situation, the plaintiff was authorized to pursue a civil action for enforcement of the decision or to commence de novo proceedings. See § 1614.503(g). Plaintiff never received such notification because the agency determined that the Army provided the ordered relief. Therefore, because Plaintiff did not file suit within ninety (90) days and the Commission did not notify Plaintiff that the Army failed to comply with the final agency decision, there is no controversy for the Court to resolve. (Fn 5.)

3. Equitable Mootness

Plaintiff's case is also equitably moot because it would be impractical to proceed based on the passage of time and implementation of the final agency decision. The Fourth Circuit has determined that equitable mootness is a "pragmatic principle, grounded in the notion that, with the passage of time after a judgment in equity and implementation of that judgment, effective relief on appeal becomes impractical, imprudent, and therefore inequitable." MAC Panel Co. v. Virginia Panel Corp., 283 F.3d 622, 625 (4th Cir. 2002). The doctrine of equitable mootness applies most often to bankruptcy proceedings, but can apply in other contexts. Id. The Fourth Circuit identified several factors to examine, including

(1) whether the appellant sought and obtained a stay; (2) whether the reorganization plan or other equitable relief ordered has been substantially consummated, (3) the extent to which the relief requested on appeal would affect the success of the reorganization plan or other equitable relief granted; and (4) the extent to which the relief requested on appeal would affect the interests of third parties. Id.

On the facts at issue in this case, only factor two is relevant because there are no stays, reorganization plans, or third parties to consider. The EEOC determined on March 10, 2003 that the Defendant had complied with the remedial order. Opposition at Exh. 9. Thus, the relief has been not just "substantially consummated," but completely consummated; it would

be difficult, if not impossible, to undo this relief. Therefore, this case is equitably moot.

4. Accommodation Claim

The Court grants Defendant's Motion for Summary Judgment regarding Plaintiff's accommodation claim because Plaintiff failed to exhaust his administrative remedies prior to taking action on his own. "[A)n employer must, to an extent, actively attempt to accommodate an employee's religious expression or conduct, "Chalmers v. Tulon Co. of Richmond, 101 F.3d 1012, 1018(4th Cir. 1996). In order to establish a prima fade religious accommodation claim, a plaintiff must establish that: (1) he "has a bona fide religious belief that conflicts with an employment requirement;" (2) he "informed the employer of this belief;" and (3) he `was disciplined for failure to comply with the

conflicting employment requirement." Id. at 1019. Plaintiff must establish a prima facie case before the burden shifts to the defendant to demonstrate that it would have been an undue hardship to accommodate the plaintiff's religious needs. Id. A plaintiff must exhaust his administrative remedies before pursuing a civil action under Title VII in a federal District Court. Legard, 240 F. Supp. 2d at 543; see Venkatrarnan v. REI Systems, Inc., 417 F.3d 418, 422 (4th dr. 2005) (holding that itle VII claims are barred when the plaintiff fails to exhaust administrative remedies).

Plaintiff fails to make a prima facie case under the religious accommodation framework. Plaintiff's

bona fide religious beliefs regarding food preparation did not conflict with an employment requirement associated with his job as a Contracting Specialist. In addition, although Plaintiff may have informed his employer of his need for a religious accommodation, there is no indication that he was disciplined for failure to comply with any type of employment requirement.

Even if the Court assumes arguendo that Plaintiff established a prima fade case, Plaintiff cannot be awarded the remedy which he seeks now because he did not adequately exhaust his administrative remedies. See Legard, 240 F. Supp. 2d at 543. Although Plaintiff eventually exhausted his administrative remedies, he exhausted them after he unilaterally addressed the situation, thereby undermining the purpose of the process to redress injuries. The agency denied Plaintiff's initial request for a new oven, stating that it did not provide new built-in ovens. Opposition at Exh. 29. Plaintiff then appealed this decision to a higher ranked official within the agency. Before he received a decision on his "appeal" of this denial, he chose to unilaterally buy a new oven and ask for reimbursement. <Fn. 6> Id. at Exh. 30. Instead, Plaintiff should have waited for the "appeal" decision. Further, after the appeal process, Plaintiff would then have had to seek redress by filing an EEO Complaint and exhausting the administrative remedies involved in that process. Because Plaintiff acted unilaterally before fully exhausting his administrative remedies, the Court grants Defendant's Motion for

Summary Judgment on Plaintiff's accommodation claim.

In the alternative, the Court grants Defendant's Motion for Summary Judgment on the accommodation claim because Plaintiff precluded Defendant from reasonably accommodating his beliefs. Plaintiff did not give Defendant a chance to reasonably accommodate his religious beliefs before he unilaterally acted by buying a new oven. Defendant did attempt to respond to Plaintiff's complaint. First, Defendant attempted to act in accordance with its current procedures by providing Plaintiff with one of the standalone appliances normally provided; that appliance did not fit Plaintiff's living situation because of technical and physical limitations. Defendant then discovered that kosherizing the existing oven was a possible avenue to pursue; while the Court notes that. Plaintiff argues that the existing oven could not have been kosherized without damaging the oven, Defendant had not fully explored that option by the time plaintiff pursued his own course of action by purchasing a new oven. See Opposition at 27. Plaintiff cannot now expect Defendant to reimburse him for an unauthorized expenditure made before the agency rendered a final decision (and an expenditure that limited the course of conduct that the agency could have pursued). Because Plaintiff's own actions precluded Defendant from finding a way to reasonably accommodate his religious beliefs, the Court grants Defendant's t4otion for Summary Judgment.

III. Conclusion

The Court grants Defendant's Motion for Summary Judgment on Plaintiff's Discrimination and retaliation claims because (1) Plaintiff untimely filed his civil action when he failed to file within ninety (90) days of the final decision of April 11, 2000, and (2) plaintiff was not notified of a right to sue based on his petition for enforcement. In the alternative, the Court grants Defendant's Motion for Summary Judgment on grounds of mootness. (because there is no live controversy for the Court to resolve)
or equitable mootness (based on the passage of time and implementation of the remedial award).

The Court grants Defendant's Motion for Summary Judgment on plaintiff's accommodation claim because Plaintiff failed to exhaust his administrative remedies before unilaterally acting, and Plaintiff's actions in fact precluded Defendant from reasonably accommodating his religious beliefs.

he Court denies Plaintiff's Motion for Summary Judgment on Plaintiff's discrimination and retaliation claims because (l) plaintiff failed to file his civil action within the statute of limitations, and (2) Plaintiff was not notified of a right to sue based on his petition for enforcement.

For the foregoing reasons, it is hereby ORDERED that Defendant's Motion for Summary Judgment on Plaintiff's discrimination and retaliation claims is GRANTED. It is further

ORDERED that Defendant's Motion for Summary Judgment on Plaintiff's accommodation claim is GRANTED. It is further

ORDERED that Plaintiff's Motion for Partial Summary Judgment on Count I (the discrimination claim) is DENIED.

The Clerk is directed to forward a copy of this Order to counsel.

ENTERED this 23 day of January, 2007.
Alexandria, Virginia
1/23/07

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

STAN LABER, Plaintiff,

v. CIVIL ACTION NO. 1:03-732

FRANCIS J. HARVEY,)
Secretary of the Army,

Defendant.

THIS MATTER isbefore the Court on Defendant' s Motion for Summary Judgment and plaintiff's Motion for partial Summary Judgment. In its previous Memorandum Order of January 23, 2007, he Court

granted Defendant's motion for summary judgment as to all claims. From the foregoing, it is hereby

ORDERED that JUDGMENT is ENTERED in favor of Defendant and against Plaintiff.

The Clerk is DIRECTED to ENTER JUDGMENT pursuant to Federal Rule of Civil procedure 58.

The Clerk is directed to forward a copy of this Order to counsel.

ENTERED this 23rd day of January, 2007.

Gerald Bruce Lee
Unisted States District Judge
Alexandria, Virginia
1/23/07

Fn <1>"The Court construes the amended Complaint to allege one count of discrimination in connection with the 1990 non-selection allegationl."The court finds that defendant would be prejudiced within the meaning of Davis v. Piper Aircraft Co, 615 F 2d 606, 613 (4th Cir. 1980) by treating each of the thirty-three additional non-selections cited in plaintiff's amended complaint after remand [plaintiff's amended Complaint After Remand at 19, 20, 24, 41) Laber v Harvey, no 1:03cv732 (F.D. Va. Aug 3, 2003 (No. 66) as separate claims for discrimination." Order, Laber v. Harvey, No. 1:03 cv: 732 (E.D. Va. Aug.3, 2003) (No. 66). Similarly, the Court construes the amended Complaint to allege one count of retaliation. Id.

Fn <2>The Fourth Circuit held that nothing precluded the Defendant in this case from raising its untimeliness argument on remand to this Court. Laber, 438 F.3d at 429 n.25.

Fn. <3> The OFO decision (upheld by the later April 11, 2000 decision) addressed both Mr. Laber's allegations that agency officials discriminated against him on the basis of his religion (Jewish) and in reprisal for engaging in prior EEO activity." Opposition at Exh, 2.

Fn. <4>The "Decision on a Petition for Clarification" signed by Canton M.
Hadden, Director of the Office of Federal Operations on March 10, 2003 stated:

> By his letter dated July 19, 2000, petitioner stated that he had accepted the agency's offer of employment in Germany with no conditions regarding placement in Israel or elsewhere. Petitioner withdrew that portion of his petition for enforcement which claimed that the agency's offer of employment was deficient because the location was not Israel, and requested that his petition be modified accordingly.

Opposition at Exh. 9.

Fn. <5> The Court also notes that the doctrine of judicial estoppel does not apply here because the Defendant has not stated a factual position that is

inconsistent with actual position taken in previous Litigation and accepted by the Court. See Emergency One, Inc. v. American Fire Eagle Engine Co. Inc., 332 F.3d 264, 274 (4th Cir. 2003).

Fn <6> The Court wonders why Plaintiff did not address concerns about necessary appliances when initially choosing living accommodations.

July 7, 2007 District Court Decision to Deny Reconsideration

IN THE UNITED STATES COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION 1:03-732

STAN LABER, PLAINTIFF

FRANCIS J. HARVEY, SECRETARY OF THE ARMY DEFENDANT

CIVIL ACTION 1:03-732

THIS MATTER is before the Court on Plaintiff's Motion to Reconsider and Alter or Amend this Court's January 23, 2007 Memorandum Opinion granting summary judgment for the Defendant.

Having reviewed the grounds cited by the Plaintiff in support of his motion for reconsideration, the Court finds that Plaintiff has not provided a sufficient basis for reconsidering its decision. The Court has narrow discretion under Rule 59(e); because there has been no change in the controlling law and no clear error of law or manifest injustice, it would be inappropriate to alter or amend the judgment. Hill v. Braxton, 277 F.3d 701, 708 (4th Cir. 2002) (citation omitted). In addition, this Court cannot consider arguments made by the Plaintiff for the first time in a motion to reconsider. Holland v. Big River Minerals

Corp, 181 F.3d 597, 605 (4th Cir. 1999) (citations omitted).

The Court also notes that while there were many discrimination claims folded into the one count of discrimination in the Complaint that were not time barred, those claims failed to exhaust administrative remedies and are equitably moot.. In addition, the multiple retaliation claims consolidated in one count of retaliation in the Complaint failed because even though they were not time-barred, they were equitably moot.

Accordingly, it is hereby ORDERED that Plaintiff's Motion to Reconsider is DENIED.

The Clerk is directed to forward a copy of this Order to Defendant and counsel of record.

ENTERED this (11th day of July, 2007.

Gerald Bruce Lee, United States District Judge, Alexandria, Virginia

07/11 /07

February 16, 2006, Fourth Circuit En Banc Decision, Laver v Harvey

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
STAN LABER, □
Plaintiff-Appellant,
v. No. 04-2132
FRANCIS J. HARVEY, Secretary of the Army,
Defendant-Appellee. □
Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Gerald Bruce Lee, District Judge.
(CA-03-732-1-A)
Argued: October 27, 2005
Decided: February 16, 2006
Before WILKINS, Chief Judge, and WIDENER, WILKINSON, NIEMEYER, LUTTIG, WILLIAMS, MICHAEL, MOTZ, TRAXLER, KING, GREGORY, SHEDD, and DUNCAN,

Circuit Judges. Reversed in part, vacated and remanded in part, and affirmed in part by published opinion. Judge Williams wrote the opinion, in which Chief Judge Wilkins, Judge Wilkinson, Judge Luttig, Judge Michael, Judge Motz, Judge Traxler, Judge King, Judge Gregory, Judge Shedd, and Judge Duncan

joined. Judge Wilkinson wrote a separate concurring opinion. Judge Widener wrote a separate opinion concurring in part and dissenting in part. Judge Niemeyer wrote a separate opinion concurring in part and dissenting in part.

COUNSEL

ARGUED: Jeffrey Howard Greger, Fairfax, Virginia, for Appellant. Charles Wylie Scarborough, UNITED STATES DEPARTMENT OF JUSTICE, Civil Division, Appellate Section, Washington, D.C., for Appellee. **ON BRIEF:** Paul J. McNulty, United States Attorney, Kevin J. Mikolashek, Special Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia; Captain Steven Michael Ranieri, UNITED STATES ARMY LEGAL SERVICES AGENCY, Arlington, Virginia, for Appellee.

OPINION

WILLIAMS, Circuit Judge:

Stan Laber, a civilian employee of the Army, complained to the Equal Employment Opportunity Commission's Office of Federal Operations (OFO) that on two occasions the Army did not give him a job promotion for reasons that violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. § 2000e-16 (West Supp. 2005) (Title VII) and the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C.A. § 633a (West Supp. 2005) (ADEA). In particular, Laber asserted that the Army once failed to

promote him because of religious discrimination and later failed to promote him because of age discrimination and in retaliation for his prior Equal Employment Opportunity (EEO) filings. The OFO found that the Army had discriminated against Laber on the basis of religion and awarded him certain relief, although it did not award him all he sought. The OFO also found that the Army had neither discriminated against Laber on the basis of age nor retaliated against him.

Laber filed suit in the district court alleging that (1) the OFO's remedy was insufficient to compensate him for the Army's religious discrimination and (2) the Army discriminated against him on the basis of age and retaliated against him. On his first claim, Laber contended that because the OFO found that the Army unlawfully discriminated against him on the basis of religion, he was not required to relitigate the issue of liability in order to seek additional relief on that claim. The district court granted the Army's motion for summary judgment on both of Laber's claims, concluding that (1) it lacked subject-matter jurisdiction over Laber's claim for additional relief, and (2) (a) Laber's age discrimination claim failed because he had not shown he was qualified for the job in question, and (b) Laber's retaliation claim failed because the hiring officer made the decision not to select him before the officer knew about his prior EEO activity. After the district court's entry of judgment, Laber filed a motion for reconsideration and a motion to amend his complaint, wherein he sought to put at issue the Army's underlying liability on his claim of religious discrimination. The district court denied these motions, and Laber appeals.

In concluding that it lacked subject-matter jurisdiction over Laber's claim for additional relief, the district court overlooked *Pecker v. Heckler*, 801 F.2d 709 (4th Cir. 1986), and *Morris v. Rice*, 985 F.2d 143 (4th Cir. 1993). Those cases stand for the proposition that a federal-employee plaintiff who prevails before the OFO on the issue of liability but is unsatisfied with the OFO's remedial award may file a civil action in the district court seeking additional relief without also putting at issue the OFO's finding of discrimination.

After oral argument to the panel assigned to hear this case, and at the request of that panel, a majority of the active circuit judges on this court agreed to rehear this case en banc to consider the continuing viability of *Pecker* and *Morris*. We now overrule *Pecker* and *Morris* and hold that a federal-employee plaintiff who prevails before the OFO on the issue of liability but who is unsatisfied with the OFO's remedy must place his employing agency's discrimination at issue in order properly to claim entitlement to a more favorable remedial award in the district court. Laber's failure to comply with this rule was not a jurisdictional defect, but it did entitle the Army to summary judgment on his claim for additional relief only. We also conclude, however, that the district court abused its discretion in denying Laber's motion for reconsideration and motion to amend: Laber did not act in bad faith, his proposed amendment would not cause any prejudice to the Army, and the proposed amendment is not futile.

Finally, we hold that the district court correctly granted summary judgment in favor of the Army on

Laber's claim of age discrimination and retaliation. Laber failed to show he was qualified for the job in question and did not demonstrate that the Army's legitimate, nondiscriminatory reason for his non-selection was a pretext for retaliation.

For reasons that are more extensively explained herein, we reverse the district court's denial of Laber's motion for reconsideration and motion to amend, vacate the district court's grant of the Army's motion for summary judgment on Laber's claim for additional relief, and remand with instructions to allow Laber to amend his complaint to put at issue the Army's alleged religious discrimination. We also affirm the grant of summary judgment to the Army on Laber's claims of age discrimination and retaliation.

I.

This appeal involves claims arising out of two occasions when the Army denied Laber a promotion. The administrative proceedings were protracted, and our resolution of the appeal requires us briefly to consider those proceedings and the facts that underlie them.

A.

Laber, a male born in 1945, was employed by the Army as an Operations Research Analyst at Fort Sheridan, Illinois. In mid-1990, motivated in part by his Jewish heritage, Laber applied for a position as a Industrial Specialist in Tel Aviv, Israel. During the job interview, the selecting officer, Leo Sleight, asked Laber if he could be objective when dealing with Jewish

contractors. Laber answered affirmatively, but Sleight offered the job to another applicant.

Laber filed a formal EEO complaint with the Army alleging that Sleight discriminated against him on the basis of religion in failing to select him for the job. The Army accepted the complaint and, after conducting an internal investigation, concluded that Laber suffered no discrimination. Laber appealed to the OFO.

On December 22, 1998, the OFO reversed and ordered the Army, inter alia, to pay Laber any backpay and benefits for which the Army determined he was eligible and to appoint Laber as an Industrial Specialist in Israel or find a similar position for him. On January 25, 1999, Laber filed a motion for reconsideration, which the OFO denied on April 11, 2000. In May 2000, the Army determined that Laber was entitled to no backpay because his pay at his current job was higher than it would have been had he been working in Israel and that he was entitled to no overseas benefits because he had not actually been overseas. The Army also offered Laber a position as an Industrial Specialist in Germany, contending that it had no similar positions open in Israel. Laber refused the job in Germany and instead filed a petition for enforcement with the OFO, claiming, inter alia, that the Army's backpay and benefits calculations and its job offer were insufficient. Soon thereafter, the Army re-offered Laber the position in Germany, which he accepted, and in doing so, he expressly waived any claim that the Germany position was not compliant with that portion of the OFO's remedial award. He therefore withdrew that portion of his petition for

enforcement challenging the Army's Germany job offer.

On January 23, 2002, the OFO issued a decision on the remainder of the petition for enforcement. In relevant part, the OFO determined that the record was unclear with respect to Laber's backpay and benefits arguments, and it required the Army to redetermine whether Laber was entitled to additional backpay and benefits. On or about May 29, 2002, the Army did so and concluded that Laber was entitled to over $9,000 in additional backpay, but that he was not entitled to receive any overseas benefits. On March 4, 2002, Laber filed a petition for clarification with the OFO, asserting that the Army's benefits and backpay calculations were still deficient. On March 10, 2003, the OFO affirmed that the Army had fully complied with the OFO's December 22, 1998 decision.

B.

The second event giving rise to this lawsuit occurred in 1993. After returning from Germany, Laber was employed as a Management Analyst at the Defense Logistics Agency in Chicago, Illinois when a position for an Operations Research Analyst in the Economic Analysis Division of the Cost and Economic Analysis Agency in Falls Church, Virginia became available. Laber was a "priority candidate" for the position because of his prior EEO activity.[1] (J.A. at 28, 405.) The parties agree that priority candidates need not compete against other candidates; rather, if qualified for the positions for which they have applied, they

must be selected.

The Army's civilian personnel office determined that Laber was "minimally qualified" for the Operations Research Analyst position,
(J.A. at 457), and forwarded Laber's application form, Form 2302, to Richard Scott, the selecting officer, for further evaluation. An applicant who is "minimally qualified" is not necessarily qualified for the particular job vacancy, but only satisfies the basic competency requirements for a generic job within the pay grade and title. Scott examined Laber's Form 2302 and concluded, like the personnel office, that Laber was "minimally qualified" for the position. (J.A. at 426.) Scott therefore called Laber to request that he supplement his Form 2302 with additional information regarding his qualifications for the particular position. Laber avers that during this conversation, Scott, who knew that Laber was a priority candidate, asked him whether he had prior EEO activity in order to determine why he had received priority status. Laber further alleges that he informed Scott that he had prior EEO activity and that Scott immediately became short with him and quickly ended the conversation. After reviewing Laber's supplemental information, Scott determined that Laber was not qualified for the particular job. Instead, Scott chose a male candidate under 40 years of age who was not on the priority candidate list.

Laber filed a complaint with the Army alleging age discrimination and retaliation. The Army accepted the complaint, investigated Laber's allegations, and found that Scott had not discriminated against Laber. Laber

appealed to the OFO and, on June 25, 2003, the OFO affirmed the Army's findings.

[1]It is unclear exactly what type of EEO activity qualifies an employee as a priority candidate. We need not resolve this ambiguity here, however, because the evidence demonstrates, and the Army does not contest, that however he became one, Laber was a priority candidate.

II.

On June 4, 2003, unhappy with the OFO's decision on his religious discrimination claim and anticipating an unfavorable decision on his age discrimination and retaliation claims, Laber filed a pro se complaint in the district court alleging claims of (1) religious discrimination and (2) age discrimination and retaliation.[2] While Laber alleged as background information that the Army had discriminated against him on the basis of religion, his complaint explicitly refrained from seeking a judicial determination of whether the Army had discriminated against him on that basis. (J.A. at 7 ("Plaintiff is not appealing the finding of [religious] discrimination, but seeks additional relief.").) Because Laber believed that the OFO's finding of religious discrimination settled that issue in his favor, he only sought additional backpay, benefits, and attorney's fees and costs because of the religious discrimination.[3] Laber did, however, allege (and put at issue)

[2]At the time Laber filed his judicial complaint, his

age discrimination and retaliation claims were not yet exhausted. Those claims became exhausted, however, on June 24, 2003, when the OFO decided his appeal on those claims.

[3]Some concern arose at the en banc oral argument over whether Laber's complaint actually put the Army's alleged religious discrimination at issue. We believe, like the district court, that it did not. As noted in the text, while the complaint does state that the Army discriminated against Laber on the basis of religion, it does so only as background information; in other words, while Laber alleges that the underlying discrimination occurred, he explicitly refrained from seeking a judicial determination of the discrimination. Laber's statement that he "is not appealing the finding of discrimination," (J.A. at 7), had the same effect as if Laber simply had not stated that the Army discriminated against him at all.

Other documents in the record support the conclusion that Laber did not put the Army's underlying religious discrimination at issue. In Laber's memorandum in support of his motion for summary judgment, he described his suit in the following manner:

> [T]he [Army] has refused to pay Plaintiff his back pay and benefits stemming from Plaintiff's successful [OFO] complaint based on his not be-

> ing reassigned to a position in Israel that became vacant in 1989. The [OFO] ordered Plaintiff to be made whole but allowed [the Army] to make the relevant determination and found that [the Army] met all of the [OFO's] requirements. . . .

that the Army had discriminated against him on the basis of age and retaliated against him for his prior EEO complaints.

The Army filed a motion for summary judgment, which the district court granted. The district court concluded, inter alia, that it lacked subject-matter jurisdiction over Laber's claim for additional relief arising out of the Army's religious discrimination because Laber did not also put the Army's underlying discrimination at issue.[4] Based on

> Plaintiff maintains that [the Army] failed to provide him all of the back pay and benefits he is due for the period 1990 to 2004 and that [OFO's] decision [that the Army has fulfilled its obligations] is in error.

(Mem. in Supp. of Pl.'s Mot. for Summ. J. at 1.) Similarly, in his pre-trial Statement of Uncontested Facts, Laber stated that he "filed [suit] in Federal Court to force the Army to meet its obligations." (Pl.'s Statement of Uncontested Facts at 4.) Likewise, in a filing in support of his motions for reconsideration and to amend, Laber argued that "the bottom line is that [the Army] simply refused to pay the [compensation to

which I am due.] Plaintiff respectfully requests the Court to rule on the basis of the make whole issue. . . ." (Supplemental Mem. in Supp. of Pl.'s Motions For Leave to Amend and Recons. at 2.) These statements clarify that Laber's religious discrimination claim was one for additional relief only. In addition, the Army early (and often) characterized that claim as one for "additional compensation." (Mem. in Supp. of Def.'s Mot. For Summ. J. at 1.) Not once before the district court's grant of summary judgment did Laber attempt to disabuse either the Army or the district court of any alleged misunderstanding of his religious discrimination claim.

As discussed below, Laber argued to the district court that he intended to put the Army's religious discrimination at issue. In interpreting a pro se complaint, however, our task is not to discern the unexpressed intent of the plaintiff, but what the words in the complaint mean. And while we must construe pro se complaints liberally, *see Hemphill v. Melton*, 551 F.2d 589, 590-91 (4th Cir. 1977), to hold that Laber's complaint seeks a judicial determination of the Army's alleged religious discrimination, would not be liberal interpretation, but complete rewriting.

[4]It appears from the record that neither party brought *Pecker v. Heckler*, 801 F.2d 709 (4th Cir. 1986), or *Morris v. Rice*, 985 F.2d 143 (4th Cir. 1993), to the district court's attention.

this conclusion, the district court granted the Army's motion for summary judgment on this claim.[5] In addition, the district court concluded that Laber had not made a prima facie case of age discrimination because he had not shown he was qualified for the job, and that he did not make a prima facie case of retaliation because Scott made the decision not to select him before Scott even knew that he had previously filed discrimination complaints. The district court therefore

[5]Some concern also arose at the en banc oral argument over whether the district court's grant of the Army's motion for summary judgment on Laber's claim for additional relief was actually a dismissal of that claim. Although the district court's opinion is not crystal clear on this point, a review of the record convinces us that the district court did grant summary judgment on that claim. *See In re Tomlin*, 105 F.3d 933, 940 (4th Cir. 1997) ("When an order is ambiguous, a court must construe its meaning, and in so doing may resort to the record upon which the judgment was based." (internal quotation marks omitted)). In its written opinion, the district court concluded that "the [Army was] entitled to *judgment* as a matter of law" on the claim for additional relief. (J.A. at 40-41 (emphasis added).) The district court also indicated that it "granted [the Army's] Motion for *Summary Judgment*" and "direct[ed] the clerk to enter "*JUDGMENT* in favor of the Army" (J.A. at 56a-, 56-c (emphases added).) Likewise, the docket sheet reflects that "JUDGMENT" was entered against Laber on the claim. (J.A. at 5.) While the district court also, and confusingly, stated in its opinion that Laber's religious

discrimination claim "must be dismissed" because of the lack of subject-matter jurisdiction, (J.A. at 49), the docket sheet demonstrates that the district court did not actually dismiss that claim until after it had already granted judgment to the Army. (J.A. at 5.) The record therefore clarifies that the district court actually did not dismiss Laber's claim for additional relief, but rather granted judgment on that claim to the Army.

Of course, if the district court believed that it lacked subject-matter jurisdiction over Laber's claim for additional relief, the proper course would have been to dismiss the claim instead of granting summary judgment on it. *Cf. Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 819 (4th Cir. 2004) (en banc) (reversing district court's entry of summary judgment and remanding for district court to remand to state court where district court lacked jurisdiction over removed claim). We do not reverse on this ground, however, because we hold, as discussed in detail below, that the district court's conclusion that it lacked subject-matter jurisdiction over the claim for additional relief was erroneous, and it therefore had the power to enter judgment for the Army.
granted summary judgment on Laber's age discrimination and retaliation claims as well.

After the district court entered judgment, Laber filed a motion for reconsideration and a motion to amend. Laber argued, inter alia, that he did not intend to put only the question of whether he was entitled to

additional relief at issue in his complaint; rather, he contended, he intended also to seek a judicial determination of whether the Army discriminated against him on the basis of religion. Laber attached an amended complaint to the motion to amend. The amended complaint was identical to the original complaint except for one sentence: "Plaintiff *is* appealing the finding of [religious] discrimination. . . ." (Pl.'s Amended Complaint (emphasis added).) The district court construed Laber's motion for reconsideration as a motion under Fed. R. Civ. P. 59(e) and his motion to amend as a motion under Fed. R. Civ.

P. 15(a), and denied both motions.[6]

Laber appeals the district court's grant of the Army's motion for summary judgment and its denial of his motions for reconsideration and to amend. We have jurisdiction under 42 U.S.C.A. § 2000e-5(j) (West 2003) and 28 U.S.C.A. § 1291 (West 1993).

III.

Laber first argues that the district court erred in granting summary judgment to the Army on his claim for additional relief arising out of

[6]Laber's motion for reconsideration also challenged the district court's grant of the Army's motion for summary judgment on his claims of age discrimination and retaliation. On appeal, however, Laber's arguments regarding his motion for reconsideration focus only on whether the district court correctly denied his motion to amend his religious discrimination claim.

Laber has therefore waived any additional argument that the district court erroneously denied his motion for reconsideration as it pertained to his age discrimination and retaliation claims, *see* Fed. R. App. P. 28(a)(9) (noting that Appellant's brief must contain "contentions and the reasons for them"); *11126 Baltimore Blvd., Inc. v. Prince George's County, Md.*, 58 F.3d 988, 993 n.7 (4th Cir. 1995) (en banc) (declining to address issues that litigant "failed to brief or argue"), and we confine our consideration of Laber's motion for reconsideration to the context of Laber's religious discrimination claim.

the Army's religious discrimination. He contends that Title VII authorizes a federal-employee plaintiff who prevailed before the OFO on the issue of liability but is unsatisfied with the OFO's remedial award to file a civil action alleging only that he is entitled to additional relief.

We review de novo the district court's grant of summary judgment to the Army. *See Hill v. Lockheed Martin Logistics Mgmt.*, 354 F.3d 277, 283 (4th Cir. 2004) (en banc). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c) (West 1992); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). We construe the facts in the light most favorable to Laber, the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

In examining this argument we first consider the legal background in which the argument arises. Next, we consider the implications of *Chandler v. Roudebush*, 425 U.S. 840 (1976), on our prior cases and hold that *Chandler* requires us to overrule those cases. Finally, we decide that the rule we announce is not one that deprived the district court of subject-matter jurisdiction because it involved the interpretation of a federal law.

A.

1.

As amended, Title VII of the Civil Rights Act of 1964 creates a right of action for both private-sector and certain[7] federal employees alleging employment discrimination on the basis of race, color, religion, sex, or national origin. *See* 42 U.S.C.A. § 2000e-5(f)(1) (West 2003)(private-sector employees); 42 U.S.C.A. § 2000e-16(c) (federal employees).[8] All employees, private-sector or federal, alleging such

[7]It is undisputed that Laber falls within the class of federal employees protected by Title VII.

[8]Title VII also creates a right of action for state employees, *see, e.g.*, 42 U.S.C.A. § 2000e-5(e) (West 2003), but this right does not figure in this appeal.

discrimination must, however, exhaust their administrative remedies before exercising this right. *See*

Patterson v. McLean Credit Union, 491 U.S. 164, 181 (1989), *superceded by statute on other grounds by* 42 U.S.C.A. § 1981(b) (West 2003) (private-sector employees); *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 832 (1976) (federal employees). The administrative remedies available for federal employees are significantly broader than the administrative remedies for employees in the private sector. *See generally Moore v. Devine*, 780 F.2d 1559, 1562 (11th Cir. 1986) (discussing differences in administrative remedies for private-sector and federal employees).

An employee in the private sector who believes that his employer has discriminated against him in violation of Title VII must file an administrative charge with the Equal Employment Opportunity Commission (EEOC) against his employer. *See* 29 C.F.R. § 1601.7 (2004). The EEOC investigates the complaint to determine whether there is reasonable cause to believe the employee's allegations. *See* 29 C.F.R. §§ 1601.15, 1601.21. Because the EEOC has no power to order the private-sector employer to take corrective action even if it finds such reasonable cause exists, "it must attempt to eliminate the discriminatory practice through informal methods of conciliation." *Moore*, 780 F.2d at 1562; *see also* 29 C.F.R. § 1601.24. If these attempts fail, or if the EEOC has found no reasonable cause, the EEOC issues the employee a right-to-sue letter explaining that he may bring a "civil action" in federal court seeking judicial review of his discrimination claim. *See* 42 U.S.C.A. § 2000e-5(f)(1); 29 C.F.R. § 1601.28.

A federal employee who believes that his employing

agency discriminated against him in violation of Title VII must file an administrative complaint with the agency. *See* 29 C.F.R. § 1614.106. The agency investigates the claim, *see* 29 C.F.R. § 1614.108-109, and, if it concludes there was no discrimination, it issues a final agency decision to that effect, *see* 29 C.F.R. § 1614.110. The employee may then appeal the agency's decision to the OFO. *See* 29 C.F.R. § 1614.401(a).[9]

[9]The federal employee may also opt-out of the administrative process at this point by filing a de novo civil action. *See* 42 U.S.C.A. 2000e-16(c) (West 2003); 29 C.F.R. § 1614.407(a) (2004) (providing that employee may file a civil action within 90 days if no appeal is filed from the agen
Unlike in the private-sector context, if the OFO finds discrimination, it has the power to order corrective action. *See* 42 U.S.C.A. § 2000e16(b); 29 C.F.R. § 1614.405. In fact, if the OFO finds that the agency discriminated against an applicant for employment, like Laber, the OFO must award the employee the position for which he applied (or its substantial equivalent) and back pay. *See* 29 C.F.R. § 1614.501(b). The OFO may also award compensatory damages, *see West v. Gibson*, 527 U.S. 212 (1999), and attorney's fees and costs, *see* 29 C.F.R. § 1614.501(e).

While the employing agency has no right to seek judicial review of the OFO's resolution of an employee's claim, the regulations provide an employee two separate avenues into federal court. First, the employee has the right to file a "civil action" seeking judicial review of his discrimination claim if he is "ag-

grieved" by the OFO's decision. *See* 42 U.S.C.A. § 2000e-16(c) (right of action exists if employee "aggrieved"); 29 C.F.R. § 1614.407(c). This right of action is identical to the right of action possessed by a private-sector employee who has received a right-to-sue letter. See Chandler v. Roudebush, 425 U.S. 840, 844-45 (1976) (holding that "federal employees [have] the same right [of action] as private sector employees enjoy").10 Second, the regulations provide that an employee may,

cy's final decision). Failure to do so does not prejudice the employee's right to file an appeal of the OFO's decision on appeal of the employing agency's findings. *See, e.g.*, 29 C.F.R. § 1614.407(c) (providing that employee may file a civil action within 90 days of OFO's decision on appeal). Laber did not file his civil action at this point in the administrative process.

[10]The section creating a cause of action for federal employees provides in full:

> Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsec-

> tion (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after [180] days from the filing of

in certain circumstances, the contours of which are not relevant here, seek judicial enforcement of the OFO's underlying decision either by filing a suit for "enforcement of the [OFO's] decision," or by "seek[ing] judicial review of the agency's refusal to implement the ordered relief pursuant to the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.*, and the mandamus statute, 28 U.S.C. § 1361." 29 C.F.R. § 1614.503(g). In a suit for enforcement, the issue is not liability or the remedy, as it is in a civil action, but rather whether the federal employer has complied with the OFO's remedial order. *See Scott v. Johanns*, 409 F.3d 466, 469 (D.C. Cir. 2005) ("In . . . enforcement actions, the court reviews neither the discrimination finding nor the remedy imposed, examining instead only whether the employing agency has complied with the administrative disposition."); *Timmons*
v. White, 314 F.3d 1229, 1232 (10th Cir. 2003) (concluding that the "[p]laintiff [was] not seeking enforcement of a final EEOC order" because he "requested more relief than the EEOC awarded").

2.

We have applied these provisions before. In *Pecker v. Heckler*, 801 F.2d 709 (4th Cir. 1986), the federal-employee plaintiff filed an administrative complaint against her employing agency alleging unlawful employment discrimination in failing to promote her. *Id.* at
710. The agency agreed that it had discriminated

against the plaintiff and indicated it would provide her priority consideration for the next

> the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a *civil action as provided in section 2000e-5* of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

42 U.S.C.A. § 2000e-16(c) (emphasis added). Section 2000e-5 provides that a private sector employee may also bring a "civil action" alleging employment discrimination. 42 U.S.C.A. § 2000e-5(f)(1).

job opening. *Id.* The plaintiff appealed to the OFO, contending that the agency's remedy was insufficient, and the OFO affirmed the agency's decision. *Id.* The plaintiff then filed suit in the district court seeking, inter alia, a declaration that the agency discriminated against her and an injunction requiring the agency immediately to promote her. *Id.*[11] The agency moved for summary judgment, contending that the OFO's award was sufficient, and the district court granted summary judgment to the agency. *Id.*

On appeal, we reversed, holding that the employee was entitled to the declaration because "the [agency is] bound by the [OFO]'s findings of discrimination." *Id.* at 711 n.3. In addition, despite the OFO's determination that the plaintiff was entitled only to priority consideration for the next job opening, we concluded that the plaintiff had demonstrated that she was entitled to an immediate promotion. *Id.* at 712.

In *Morris v. Rice*, 985 F.2d 143 (4th Cir. 1993), a federal employee filed an administrative claim against his employing agency alleging unlawful discrimination in failing to promote him. *Id.* at 144. The agency agreed that discrimination had occurred, but found that he was entitled to neither the position nor back pay because he would not have been promoted even if there had been no discrimination. *Id.* at 145. Dissatisfied with the remedy, the employee appealed to the OFO, which affirmed. *Id.* The employee then filed a civil action in the district court seeking review of the OFO's determination of discrimination and its remedy. *Id.* The district court granted the employee's

[11]It is unclear whether the plaintiff in *Pecker* brought a civil action or a suit for enforcement. On the one hand, the court characterized the suit as a "suit to enforce a decision of the [OFO]." 801 F.2d 709, 709 (4th Cir. 1986). On the other hand, the court allowed the plaintiff to seek a greater remedy than awarded by the OFO, a form of relief that, as discussed in Part III.A.1, *supra*, is outside the scope of a suit for enforcement. In the end, the precise type of action at issue in *Pecker* makes no difference. If *Pecker* was a

civil action, as we assume in the text, we would overrule its holding allowing federal employee plaintiffs in such actions to litigate before the district courts only the issue of additional relief. If, on the other hand, *Pecker* was a suit for enforcement, its holding that a federal employee plaintiff in such actions may seek greater relief in the district court than that awarded by the OFO was incorrect.
motion for summary judgment on his claim of liability. *Id.* We affirmed, citing *Pecker* for the conclusion that a "[federal-employee] plaintiff [who files a civil action] may limit and tailor his request for *de novo* review, raising questions about the remedy without exposing himself to *de novo* review of a finding of discrimination." *Id.*

Pecker and *Morris* stand for the proposition that Title VII authorizes a federal employee to bring a civil action wherein he challenges only the OFO's remedial award, but does not put his employing agency's underlying discrimination at issue.[12] A fair application of the rule announced in *Pecker* and *Morris* to the facts of this case would require us to reverse the district court's grant of the Army's motion for summary judgment. For reasons we explain in more detail below, however, we do not apply *Pecker* and *Morris* because the rule those cases announced was inconsistent with the statutory scheme and prior Supreme Court case law.

B.

1.

As in all cases requiring the interpretation of a statute, we begin our analysis with the language of the statute itself. *See United States v. Abuagla*, 336 F.3d 277, 278 (4th Cir. 2003). "We must first determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Id.* (internal quotation marks omitted).

The relevant statutory language here is minimal, but nevertheless significant: it provides that a federal employee has the right to bring a "civil action" seeking judicial review of his claim, 42 U.S.C.A. § 2000e-16(c), and that the district court may provide certain equita

[12]It is arguable that the broad statements in *Pecker* and *Morris* were dicta because the employing agency in both of those cases admitted liability during the administrative process and the employee actually put the employer's discrimination at issue. The rule announced in those cases did not turn on this fact, however, and we think the question of whether that rule was dicta or holding is close enough to require us to overrule, instead of distinguish, the cases.

ble remedies on the claim only "[i]f the court finds" that the agency intentionally discriminated against him, 42 U.S.C.A. § 2000e-5(g) (West 2003).[13] By authorizing the district court to award equitable remedies only if *it* makes certain findings, Title VII contemplates that the civil action authorized therein requires the agency's underlying discrimination to be an issue in the case. *See (William) Morris v. Rumsfeld*, 420 F.3d 287, 292 (3d Cir. 2005) ("This language appears to contemplate that a judicial remedy must depend on judicial — not administrative — findings of discrimi-

nation, and no other statutory language suggests that this requirement should change if a claimant does in fact present an administrative finding of liability to the court."); *Scott*, 409 F.3d at 470 ("[I]n a federal-sector Title VII case, any remedial order must rest on judicial findings of liability, and nothing in the statute's language suggests that such findings are unnecessary in cases where a final administrative disposition has already found discrimination and awarded relief."); *Timmons*, 314 F.3d at 1235 ("[A] district court, which under the applicable statutes, must 'find' discrimination prior to awarding relief, cannot award new relief, or expand the relief already awarded, without first determining for itself whether the alleged discrimination has occurred.").[14]

[13]One of the provisions governing the § 2000e-5 "civil action" states:

> *If the court finds* that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the

court deems appropriate.

42 U.S.C.A. § 2000e-5(g)(1) (emphasis added). This section also governs the "civil action" created for federal employees in § 2000e-16. *See* 42
U.S.C.A. § 2000e-16(d) ("The provisions of section 2000e-5(f) through
(k) of this title, as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.").

[14]Title VII plaintiffs have the right to a jury trial if they seek compensatory or punitive damages. *See* 42 U.S.C.A. § 1981a(c) (West 2003).

While the phrase "civil action" does not have a self-evident meaning that answers the question before us, the Supreme Court has given meaning to the phrase. In *Chandler v. Roudebush*, 425 U.S. 840 (1976), the plaintiff, a federal employee, filed a discrimination complaint with her employing agency, which found no discrimination. *Id.* at 842. The agency's decision was affirmed on administrative appeal,[15] and the employee filed a civil action in the district court. *Id.* The district court, reviewing the administrative decision with a degree of deference, granted summary judgment to the agency. *Id.* at 843. The court of appeals affirmed, agreeing that the administrative findings were entitled to deference. *Id.*

The Supreme Court reversed, noting that it was "well established" that Title VII gave "private-sector employees the right to "*de novo* consideration of their [employment discrimination] claims" without requiring the district courts to give deference to an EEOC finding of no reasonable cause. *Id.* at 844. Because federal employees' right to bring a "civil action" is, by statute, identical to that of private-sector employees, the Supreme Court held that it "follow[ed] syllogistically that federal employees are entitled to a *trial de novo* on their employment discrimination claims." *Id.* at 846 (emphasis added).

Chandler, of course, does not directly control here. It held only that a federal employee's right to bring a "civil action" entitles him to a "trial de novo" on his discrimination claims in the district court where the OFO *rejects* his allegations of discrimination; it did not expressly hold that a federal employee who brings a civil action in the district court must put his employing agency's underlying discrimination at

We need not decide today whether § 1981a would require a court to award equitable relief under § 2000e-5(g)(1) if the jury's verdict included a finding of intentional discrimination. For purposes of this appeal, the import of the "court finds" language in § 2000e-5(g)(1) is simply that no one — neither the court nor the jury — may make a finding of discrimination in the civil action if the discrimination is not even put at issue in the first place.

[15]At the time, the Civil Service Commission heard appeals from agency decisions on a federal employee's Title VII administrative complaint.
issue if the OFO *accepts* those allegations. *Chandler*'s logic, however, extends to such a holding.

First, it was clear at the time of *Chandler* that private-sector employees not only had the *right* to a de novo judicial consideration of their discrimination claims without regard to the EEOC's finding of reasonable cause, *id.* at 844-45, but also that they were unable to use the EEOC's finding to compel a finding of discrimination in the district court. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), for example, the Supreme Court concluded that a private-sector employee was required to introduce a genuine issue of material fact on his Title VII claim despite the fact the EEOC had made a finding of reasonable cause on that claim. *Id.* at 801-02. If a private-sector employee must introduce the existence of a genuine issue of material fact that his employer discriminated against him to stave off summary judgment, it necessarily follows that discrimination must be an issue in the case. Because *Chandler* teaches that federal employees have the "same" rights as private-sector employees, 425 U.S. at 841, a holding that federal employees may put at issue only the OFO's remedial award would violate *Chandler* by giving federal employees *greater* rights than private sector employees in a civil action. *See Scott*, 409 F.3d at 470 ("Requiring federal-sector plaintiffs to prove liability puts them in approximately the same position as private-sector plaintiffs who, unable to obtain legally-binding [OFO] findings, must litigate

both liability and remedy." (citations omitted)).

Second, "the plain meaning of the term 'trial de novo' [as used in *Chandler*] demonstrates that a [federal employee] who brings a ["civil action"] . . . is not entitled to limit the Court's review to the issue of remedy only." *Timmons*, 314 F.3d at 1233. For example, Black's Law Dictionary defines "trial de novo" as "[a] new trial on the entire case
— that is, on both questions of fact and issues of law — *conducted as if there had been no trial in the first instance.*" Black's Law Dictionary 1544 (8th ed. 2004) (emphasis added). This definition makes clear that the federal employee's right to bring a "civil action" does not include the right to seek only an additional remedy; for all practical purposes (and with one caveat discussed below), a trial de novo proceeds as if no earlier proceedings had been completed at all. Numerous Supreme Court cases use the term "trial de novo" in the same manner. *See, e.g.*, *Colten v. Kentucky*, 407 U.S. 104, 116-117 (1972) (noting that "trial de novo" represents a "completely fresh determination of [the issues]" during which "the *de novo* court [is not] asked to find error in another court's work"); *see also Timmons*, 314 F.3d at 1233 (collecting other examples of the Supreme Court's usage of the term "trial de novo" to indicate de novo judicial examination of the entire case). Such usages are inconsistent with the view that the federal-employee plaintiff may seek to relitigate only a part of his discrimination claim.

Third, additional language from *Chandler* implies that the phrase "trial de novo" entails a de novo examination of both liability and the remedy. For

example, in response to the agency's argument in *Chandler* that permitting federal employees to obtain a trial de novo after the OFO had already ruled on their claims would be an inefficient allocation of judicial resources, the Court responded, in part, by noting that "[p]rior administrative findings made with respect to an employment discrimination claim may, of course, be admitted as evidence at a federal-sector trial *de novo*. Moreover, . . . many potential issues can be eliminated by stipulation or in the course of pretrial proceedings in the District Court." *Chandler*, 425 U.S. at 863 n.39 (citations omitted). If the Supreme Court had believed that the employee need not even put the employer's underlying discrimination at issue, there would be no need to admit prior findings as *evidence*, because the employer's discrimination would not be relevant in the case. *See Timmons*, 314 F.3d at 1235. The fact that administrative findings are merely evidence —- that, like any other evidence, can be accepted or rejected by the trier of fact —- requires the conclusion that the federal-employee plaintiff must put his employing agency's underlying discrimination at issue in the case.[16]

[16]Moreover, allowing an employee to bring a civil action challenging only the OFO's remedy would thwart the goal of resolving many administrative complaints without judicial intervention that is accomplished by affording the OFO the power to require corrective action and precluding the employing agency from seeking review of the OFO decision in federal court. *See West v. Gibson*, 527 U.S. 212, 219 (1999) (holding that OFO may award compensatory damages because

the opposite holding would "force into court matters that the [OFO] might otherwise have resolved."). Affording federal employees who prevail before the OFO on the question of liability but who are unsatisfied with the OFO's remedial

2.

Laber does not mount a serious challenge to this conclusion. Rather, he asserts that we should continue to adhere to our decisions in *Pecker* and *Morris*. [17] We cannot agree. The courts in *Pecker* and *Morris* did not analyze the statutory language, nor did they address the implications of *Chandler*. Rather, the only authority they cited in support of their holdings were *Moore v. Devine*, 780 F.2d 1559 (11th Cir. 1986), *Houseton v. Nimmo*, 670 F.2d 1375 (9th Cir. 1982), and *Haskins v. United States Dept. of the Army*, 808 F.2d 1192 (6th Cir. 1987). *See Pecker*, 801 F.2d at 711 n.3; *Morris*, 985 F.2d 145-46. These cases, however, lend no support to *Pecker* and *Morris*.

award the right to come into federal court to seek only a greater remedy provides little, if any, disincentive from filing a civil action asserting only that their remedy was insufficient. This rule would therefore encourage, rather than discourage, resolution of suits by judicial, as opposed to administrative, means. *See Chris v. Tenet*, 221 F.3d 648, 653 (4th Cir. 2000) ("[P]ermitting a suit solely for attorney's fees and costs incurred during the course of the Title VII administrative process would run counter to the congressional aim of quick, less formal, and less expensive resolution of employment disputes.").

[17]Laber does argue that his claim for additional relief arising out of the Army's religious discrimination was proper because the Army admitted liability both by failing to file a motion for reconsideration of the OFO's decision and by partially complying with that decision. These arguments widely miss the mark. Because Laber's complaint does not seek a judicial determination of whether the Army discriminated against him, whether the Army has admitted that fact is simply irrelevant to his suit. In other words, even assuming, for the sake of argument, that the Army somehow admitted liability, Laber would not be excused from putting the Army's liability at issue; rather, he would have to put the Army's alleged discrimination at issue in order for the district court to make a finding that the Army had admitted liability. Moreover, we have never held, in any context, that a failure to file a motion for reconsideration serves as an admission that the underlying decision was correct. And we cannot agree with Laber that the Army's compliance with the OFO's remedial award serves as an admission given that the Army has no rights to appeal the OFO decision.

In *Moore*, the federal-employee plaintiff prevailed before the OFO on the issue of liability but was unsatisfied with the OFO's remedial award. 780 F.2d at 1561. He filed a civil action, asking the district court to "conduct a hearing on the merits of [his claim]." *Id.* After a bench trial, the district court entered judgment in favor of the employing agency. *Id.* The plaintiff appealed, arguing that the district court was bound by the OFO's finding of discrimination. *Id.* at 1562. The Eleventh Circuit carefully dissected Title VII and its

accompanying regulations and explained, as we have, that federal employees who are aggrieved by an OFO decision may file either (1) a civil action seeking de novo consideration of his claim, or (2) accept the OFO decision and, in the event the agency does not comply, file a suit for enforcement in the district court. In a suit for enforcement, the court observed, the plaintiff does not put the OFO's underlying finding of liability at issue. *Id.* at 1564 ("[A]n employee who seeks redress of an agency's refusal to comply with [the OFO's decision] . . . . may request enforcement by the district court without requesting and trying the merits of the claim."). By contrast, the plaintiff before it had specifically asked the district court to evaluate his entire claim de novo. *Id.* ("[W]here . . . the employee files a complaint asking the district court to consider the case on the merits and proceeds to trial de novo of the very claims resolved by the [OFO], he or she cannot complain when the district court independently resolves the claim on the merits."). In this situation, the court concluded that the district court did not err in issuing judgment against the plaintiff. *Id.*

In *Houseton*, the federal-employee plaintiff prevailed against her employing agency before the OFO on the issue of discrimination and liability and filed an action in federal court seeking enforcement of the OFO's remedial award. 670 F.2d at 1377. The district court ordered enforcement, and the Ninth Circuit affirmed without discussion. *Id.* at 1378. The court in *Houseton* set forth no holding, but the disposition suggests that the rule of law it applied was that the district court is bound to accept the OFO's finding of liability and its remedial award in a suit for enforcement. *See id.*

In *Haskins*, the federal-employee plaintiff prevailed before the OFO on the issue of liability but the OFO denied her request for damages because it found that the employing agency would not have hired the plaintiff even in the absence of discrimination. 808 F.2d at 1194.
The plaintiff filed a civil action requesting "a judicial de novo determination of the facts." *Id.* at 1195. Her employing agency stipulated that it had discriminated against her, and the district court accordingly entered summary judgment in favor of the plaintiff on the issue of liability. *Id.* After a bench trial on the issue of damages, the district court entered judgment in favor of the employing agency, finding, like the OFO, that the agency would not have hired the plaintiff even absent discrimination. *Id.* at 1196. The plaintiff appealed, arguing that the district court's entry of summary judgment to her on the issue of liability necessarily entitled her to receive her requested damages. *Id.*

The Sixth Circuit disagreed, holding that the agency's admission of liability did not encompass a corollary admission that it would have hired the plaintiff even in the absence of discrimination. The court stated that it

> [did not] take issue with the [plaintiff's] assertion that a federal employee can request a federal court to enforce a favorable EEOC order without having to risk de novo review on the merits. . . . Thus, the employing agency cannot challenge issues decided against it if the plaintiff does not seek de novo review.

> However, a plaintiff is entitled to a de novo hearing if one is requested. *Chandler v. Roudebush*, 425 U.S. 840, 861-64 . . . (1976). In such a case, the district court is not bound by the administrative findings.

Id. at 1199 and n.4.

As this discussion reveals, *Moore*, *Houseton*, and *Hawkins* simply do not bear the inference that the court in *Pecker* and *Morris* placed upon them. To be sure, *Moore* and *Hawkins* state, and *Houseton* suggests, that a federal-employee plaintiff can, in some circumstances, avoid de novo review of his underlying claims of discrimination. But *Moore* and *Hawkins* explicitly limit that statement to the context of a suit for enforcement,[18] and *Houseton*'s facts similarly reveal that its

[18]In *Ellis v. England*, 432 F.3d 1321 (11th Cir. 2005), the Eleventh Circuit expressly limited *Moore* to the enforcement context. *Id.* at 1324 ("In *Moore*, we . . . held that, where an employee *seeks enforcement* of holding is limited to the enforcement context. By citing *Moore*, *Houseton*, and *Hawkins* for the proposition that the federal-employee plaintiff may seek an additional remedy only, *Pecker* and *Morris* incorrectly applied to civil actions the law governing suits for enforcement.

3.

For the foregoing reasons, we overrule *Pecker* and *Morris* and hold that Title VII does not authorize a

federal-sector employee to bring a civil action alleging only that the OFO's remedy was insufficient.[19] Rather, in order properly to claim entitlement to a more favorable remedial award, the employee must place the employing agency's discrimination at issue.[20] In so holding, we join each of our sister circuits that have addressed the question. *See Ellis v. England*, 432 F.3d 1321, 1325 (11th Cir. 2005) ("Here, [the plaintiff] . . . sought relief under [§ 2000e-16(c)]. . . . As such, we reject [his] argument that he is entitled to a *de novo* review . . . limited to the question of damages"); *(William) Morris*, 420 F.3d at 292 ("We hold that, when a federal employee comes to court to challenge, in whole or in part, the administrative disposition of his or her discrimination claims, the court must consider those claims *de novo*, and is not bound by the results of the

a favorable [OFO] ruling, we do not review the merits of the employee's claim *de novo* . . . . While some circuits, particularly the Fourth and the Ninth, have read our decision in *Moore* to allow fragmentary *de novo* review [in a civil action], we do not read *Moore* as permitting such fragmentary *de novo* review.").

[19]The Army also argues that *Pecker* and *Morris* must be overruled because they allow a broad type of suit against the government in contravention of the command that waivers of sovereign immunity must be strictly construed. *See, e.g., Library of Congress v. Shaw*, 478 U.S. 310 (1986). Because the text, and the Court in *Chandler*'s interpretation of it, leads us to

conclude that *Pecker* and *Morris* were incorrectly decided, we need not address the Army's sovereign immunity argument.

[20]The question of whether a federal-employee plaintiff who *does* put his employing agency's discrimination at issue may require the district court to make a finding of liability based on the OFO's finding of discrimination is not before us today. We note, however, that the logic of *Chandler* leads inexorably to the conclusion that he may not.

administrative process. . . ."); *Scott*, 409 F.3d at 469 (holding that "a court [may not] review a final administrative disposition's remedial award without reviewing the disposition's underlying finding of liability"); *Timmons*, 314 F.3d at 1233 (holding that "a plaintiff [who files a de novo civil action] is not entitled to litigate those portions of an EEOC decision believed to be wrong, while at the same time binding the [employing agency] on the issues resolved in his or her favor").[21]

C.

Anticipating that we would overrule *Pecker* and *Morris*, the Army argues that by alleging only entitlement to additional relief, Laber's complaint suffers from a jurisdictional defect that deprived the district court of subject-matter jurisdiction over that claim. None of our sister circuits has directly addressed whether a complaint that does not put the employing agency's discrimination at issue but alleges entitle-

ment to a greater remedy arising out of discrimination (1) suffers from a jurisdictional defect, *see* Fed. R. Civ. P. 12(b)(1), or, (2) instead, is either subject to dismissal for "failure to state a claim upon which relief can be granted," Fed. R. Civ. P 12(b)(6), or, if the defendant does not move to dismiss, entitled to judgment as a matter of law under Rule 56.

In support of its argument that the defect in Laber's complaint is jurisdictional, the Army cites *Chris v. Tenet*, 221 F.3d 648, 652 (4th Cir. 2000). In *Chris*, the federal-employee plaintiff filed a discrimination claim with her employing agency, and the agency settled the claim. *Id.* at 649-50. The parties could not agree, however, on the amount of fees and costs, and the plaintiff filed a petition with the OFO for fees and costs. *Id.* at 650. The OFO awarded her some fees and costs, but less than she sought. *Id.* Undeterred, the plaintiff filed a claim in district court seeking additional fees and costs. *Id.* The dis

[21]In *Girard v. Rubin*, 62 F.3d 1244 (9th Cir. 1995), the Ninth Circuit held that an OFO decision that the plaintiff's administrative complaint was timely waived any argument by the employing agency in a federal-court suit that the administrative complaint was untimely. *Id.* at 1247. It is far from certain that the Ninth Circuit would interpret *Girard* to allow a federal-employee plaintiff to bring a suit seeking only additional relief.

trict court dismissed the suit for want of subject-matter jurisdiction.
Id.

We affirmed, concluding that Title VII's jurisdiction-conferring provision —- "[e]ach United States district court . . . shall have jurisdiction of actions brought under this subchapter," 42 U.S.C.A. § 2000e-5(f)(1) —- did not extend to actions for fees and costs only:

> [T]he phrase 'actions brought under this subchapter' refers [only] to legal proceedings in a court of law to enforce the substantive rights guaranteed by Title VII, specifically the right to be free from employment discrimination on the basis of race, color, religion, sex, or national origin. . . .[A]n 'action brought under this subchapter' . . . must involve a claim to remedy an unlawful employment practice, rather than contain only a single claim for attorney's fees and costs.

Id. at 652 (emphasis added). The Army argues that a claim for additional relief only, like a claim for attorney's fees and costs only, is not an "action[ ] under [Title VII]" sufficient to confer subject-matter jurisdiction in the district court. 42 U.S.C.A. § 2000e-5(f)(1).

We disagree. Even assuming we agreed with the Army's extension of *Chris*, that case held only that subject-matter jurisdiction was lacking *under § 2000e-5(f)(1)*. Because, according to the court in *Chris*' description of the issue before it, Chris did not argue that subject-matter jurisdiction existed *under 28 U.S.C.A. § 1331* (West 1993) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."), the court in *Chris* did not consider whether §

1331 could have been an alternate source of subject-matter jurisdiction. *Chris* therefore did not hold that subject-matter jurisdiction is lacking under § 1331 for a claim of attorney's fees and costs only, much less that subject-matter jurisdiction is lacking under § 1331 for a claim of additional relief only. *Cf. Hagans v. Lavine*, 415 U.S. 528, 533 n.5 (1974) ("[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us.").

Moreover, since *Chris* was decided we have held that § 1331 provides an additional jurisdictional basis for suits arising under Title VII, *see Venkatraman v. REI Sys., Inc.*, 417 F.3d 418, 420 (4th Cir. 2005), and a strong majority of our sister circuits has held the same, *see Burgh v. Borough Council of Borough of Montrose*, 251 F.3d 465, 469 (3d Cir. 2001); *Smith v. Ashland, Inc.*, 250 F.3d 1167, 1169 (8th Cir. 2001); *English v. Colo. Dept. of Corr.*, 248 F.3d 1002, 1007 (10th Cir. 2001); *Rutherford v. City of Cleveland*, 137 F.3d 905, 908 (6th Cir. 1998); *Saunders v. Venture Stores, Inc.*, 56 F.3d 771, 772 (7th Cir. 1995); *Vera-Lozano v. Int'l Broad.*, 50 F.3d 67, 68 (1st Cir. 1995); *Intlekofer v. Turnage*, 973 F.2d 773, 774 (9th Cir. 1992); *Palmer v. Dist. Bd. of Tr. of St. Petersburg Junior Coll.*, 748 F.2d 595, 596 (11th Cir. 1984). A district court has subject-matter jurisdiction under § 1331 when "the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another." *Bell v. Hood*, 327 U.S. 678, 681, 685 (1946).

Because, as this opinion reveals, resolution of Laber's claim for additional relief required interpretation of Title VII, a federal law, the district court had subject matter jurisdiction over Laber's claim under § 1331. Of course, district courts may lack jurisdiction over future claims similar to Laber's claim under the insubstantiality doctrine. *See Hagans*, 415 U.S. at 536-37 ("[F]ederal courts are without power to entertain claims otherwise within their jurisdiction if they are so attenuated and unsubstantial as to be absolutely devoid of merit, wholly insubstantial, obviously frivolous, plainly insubstantial, or no longer open to discussion." (internal citations and quotation marks omitted)). But we cannot say that the federal question presented by Laber's complaint —- whether a federal-employee plaintiff who prevails before the OFO may seek only additional relief in the district court —- was so insubstantial as to deprive the district court of jurisdiction under § 1331, especially considering that *Pecker* and *Morris* arguably *authorized* Laber's complaint. *Cf. Dixon v. Coburg Dairy*, 369 F.3d 811, 817 n.5 (4th Cir. 2004) (en banc) (concluding that an allegation that the First Amendment applies to private employers "would be too insubstantial to invoke federal question jurisdiction because the First Amendment does not apply to private employers"). We therefore decline to extend *Chris* beyond its limited facts, and, because resolution of Laber's claim required interpretation of a federal law, we conclude that the district court had subject-matter jurisdiction over Laber's claim for additional relief and that the Army was entitled to judgment as a matter of law on the claim.[22]

IV.

Laber next argues that the district court abused its discretion in denying his motion for reconsideration and to amend. He argues that justice requires that he be given the opportunity to amend his complaint to put the Army's underlying religious discrimination at issue.

A plaintiff may amend his complaint one time as a matter of course before the defendant files a responsive pleading. Fed. R. Civ. P. 15(a). Once the defendant files a responsive pleading, however, the plaintiff may amend his complaint only by leave of the court or by written consent of the defendant, id., but Rule 15(a) directs that leave to amend "shall be freely given when justice so requires." This liberal rule gives effect to the federal policy in favor of resolving cases on their merits instead of disposing of them on technicalities. See Conley
v. Gibson, 355 U.S. 41, 48 (1957) ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."); Ostrzenski v. Seigel, 177 F.3d 245, 252-53 (4th Cir. 1999) ("The federal rule policy of deciding cases on the basis of the substantive rights involved rather than on technicalities requires that [the] plaintiff be given every opportunity to cure a formal defect in his pleading." (quoting 5A Charles Allen Wright & Arthur R. Miller, Federal Practice & Procedure § 1357 (2d ed. 1990))).

[22]In a holding alternative to its holding that subject-matter jurisdiction was lacking over Laber's claim for additional damages because he did not also put the Army's underlying discrimination at issue, the district court also concluded that it lacked subject-matter jurisdiction over Laber's religious discrimination claim because he had already accepted and could not return part of the OFO's ordered remedy on that claim; i.e., the Army's Germany job offer. We disagree. Whether Laber has accepted part of the remedy may or may not be relevant in evaluating whether Laber's suit is barred by an affirmative defense — such as res judicata, estoppel, or election of remedies — but it does not affect the fact that Laber's suit was a "civil action[ ] arising under the . . . laws . . . of the United States." 28 U.S.C.A. § 1331 (West 1993).

We have interpreted Rule 15(a) to provide that "leave to amend a pleading should be denied only when the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would have been futile." See Johnson v. Oroweat Foods Co., 785 F.2d 503, 509 (4th Cir. 1986) (citing Foman v. Davis, 371 U.S. 178, 182 (1962)).[23] Whether an amendment is prejudicial will often be determined by the nature of the amendment and its timing. A common example of a prejudicial amendment is one that "raises a new legal theory that would require the gathering and analysis of facts not already considered by the [defendant, and] is offered shortly before or during trial." Id. An amendment is not prejudicial, by contrast, if it merely adds an additional theory of recovery to the facts already pled and is offered before any discovery has

occurred. Davis v. Piper Aircraft Co., 615 F.2d 606, 613 (4th Cir. 1980) ("Because defendant was from the outset made fully aware of the events giving rise to the action, an allowance of the amendment could not in any way prejudice the preparation of the defendant's case.").

Delay alone, however, is an insufficient reason to deny the plaintiff's motion to amend. See Davis, 615 F.2d at 613. For this reason, a district court may not deny such a motion simply because it has entered judgment against the plaintiff — be it a judgment of dismissal, a summary judgment, or a judgment after a trial on the merits. See, e.g., Foman, 371 U.S. at 182 (reversing district court's denial of motion to amend made after the district court entered judgment of dismissal); 6 Charles Allen Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice & Procedure § 1488 (2d ed. 1990) (collecting cases); cf. Ostrzenski, 177 F.3d at 252-53 (4th Cir. 1999) (noting that district court should not dismiss a complaint with prejudice under Fed. R. Civ. P. 12(b)(6) without first giving the plaintiff leave to amend). Instead, a post-judgment motion to amend is evaluated under the same legal standard as a similar motion filed before judgment was entered — for prejudice, bad faith, or futility. See Foman, 371 U.S. at 182; Johnson, 785 F.2d at 509-510 (dicta). A moment's reflection

[23]The Army does not argue that we should apply the "good cause" legal standard in Fed. R. Civ. P. 16(b) because Laber's motion to amend came after the deadline set in the scheduling order issued in this case. We therefore do not consider the issue.

reveals, however, that the further the case progressed before judgment was entered, the more likely it is that the amendment will prejudice the defendant or that a court will find bad faith on the plaintiff's part. Adams v. Gould, 739 F.2d 858, 864 (3d Cir. 1984) ("[T]he factors that must guide our review may be affected by the fact that a summary judgment was granted before plaintiffs sought leave to amend their complaint.").

There is one difference between a pre- and a post-judgment motion to amend: the district court may not grant the post-judgment motion unless the judgment is vacated pursuant to Rule 59(e) or Fed. R. Civ. P. 60(b). See Cooper v. Shumway, 780 F.2d 27, 29 (10th Cir. 1985) ("[O]nce judgment is entered the filing of an amended complaint is not permissible until judgment is set aside or vacated pursuant to Fed. R. Civ. P. 59(e) or 60(b)."); Scott v. Schmidt, 773 F.2d 160, 163 (7th Cir. 1985) (holding same); 6 Charles Allen Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice & Procedure § 1489; see also Murrow Furniture Galleries, Inc. v. Thomasville Furniture Indust., Inc., 889 F.2d 524, 526 n.3 (4th Cir. 1989) ("The Court denied their [Rule] 59(e) motion, thereby effectively denying their [Rule 15(a)] motion as well."); DeBuit v. Harwell Enters., Inc., 540 F.2d 690, 692 (4th Cir. 1976) ("[T]he final order of the court disposed of all of the issues between these two plaintiffs and the defendants, and since no appeals were taken the judgment became a finality and terminated the case as to them. Under these circumstances, the case could only be reopened or the order revised under the provisions of Rule 59 or 60. . . ."). A conclusion that the district court abused its discretion in denying a motion

to amend, however, is sufficient grounds on which to reverse the district court's denial of a Rule 59(e) motion. See Foman, 371 U.S. at 182 (reversing denial of motion for reconsideration of judgment of dismissal where district court abused its discretion in denying motion to amend); Dussouy v. Gulf Coast Inv. Corp., 660 F.2d 594, 597 n.1 (5th Cir. 1981) ("Where judgment has been entered on the pleadings, a holding that the trial court should have permitted amendment necessarily implies that [the] judgment . . . was inappropriate and that therefore the motion to vacate should have been granted."); Adams, 739 F.2d at 864 (adopting standard set forth in Dussouy). Regardless of whether the motion to amend is filed pre- or post-judgment, we review for abuse of discretion the district court's decision on a motion to amend. See Foman, 371 U.S. at 182.

We believe that under the unusual circumstances presented here, Laber's motion to amend must be granted. First, and most important here, there is no indication that Laber's omission from his original complaint of the legal theory he now seeks to pursue was in bad faith. In fact, Laber's original complaint was arguably proper under Pecker and Morris. Laber's case is not a run-of-the-mill case where the plaintiff's first theory of recovery is based on his own reading of our cases and it turns out that he misinterpreted how that theory would apply to the facts of his case. Instead, while Laber indeed misinterpreted how we would rule, his theory presented a close enough question under our prior cases that we deemed it necessary to grant rehearing en banc to overrule those cases. Moreover, Laber's diligence in filing his motion to

amend after the district court entered summary judgment dispels any inference of bad faith.

Second, the record reveals that the Army would not have been prejudiced by Laber's proposed amendment. Although the case progressed to summary judgment, the Army conducted no significant discovery, likely because of the factual development of Laber's claims that occurred in the administrative proceedings. Any discovery it did conduct need not be duplicated because Laber's proposed complaint does not put any new facts at issue but merely states an "alternative theory" for recovery. Foman, 371 U.S. at 182 (reversing district court's entry of judgment of dismissal and denial of plaintiff's motion to amend where "the amendment would have done no more than state an alternative theory for recovery."). Moreover, the Army made no argument that it would be prejudiced if Laber were granted leave to amend.

Third, the amended complaint is not futile. Although not artfully drafted, it does allege a cause of action for the Army's alleged religious discrimination. While the Army now argues that Laber's religious discrimination claim is untimely because he filed his complaint more than 90 days after the OFO's April 10, 2000 denial of Laber's motion for reconsideration, it did not raise this argument in opposing Laber's motion to amend below.[24] In the absence of exceptional circumstances, none of which the Army argues are present here, non-jurisdictional[25] arguments not made to the district court are waived on

[24]The Army asserts that it did make its untimeliness

argument below. The timeliness argument, however, is entirely absent from the Army's opposition to Laber's motion to amend. (Def.'s Opp. to Pl.'s Mot. to Amend.) And while the Army did make a timeliness argument in support of its motion for summary judgment, a close review of the record reveals that the Army argued only that Laber's request for attorney's fees and costs was untimely because it came more than 90 days after the OFO's January 30, 2003 decision, not that his religious discrimination claim itself was untimely because it came more than 90 days after the OFO's August 11, 2000 denial of his motion for reconsideration. (Mem. in Supp. of Def.'s Mot. For Summ. J. at 8.) These are different arguments entirely, and making the one does not preserve the other. Cf. United States v. White, 405 F.3d 208, 216 n.5 (4th Cir. 2005) (noting that preserving claim that United States Sentencing Guidelines were incorrectly applied mandatorily is insufficient to preserve claim that mandatory application of the Guidelines creates a Sixth Amendment error).

[25]The Army's argument that Laber's religious discrimination claim was untimely is not an argument challenging the district court's subject-matter jurisdiction to hear the claim. In Irwin v. Dept. of Vet. Affairs, 498
U.S. 89 (1990), the Supreme Court held that the time limit in § 2000e16(c), like all federal statutes creating a cause of action against the federal government, is subject to a rebuttable presumption of equitable tolling. Id. at 95. That section contains no language that would tend to rebut the presumption that equitable tolling applies to the 90-day time limit. 42

U.S.C.A. § 2000e-16(c). If equitable tolling applies, which it does, the time limits are not jurisdictional, but are rather in the nature of a statute-of-limitations defense. See, e.g., Zipes v. Trans World Airlines, Inc., 455

U.S. 385, 393 (1982) (noting that "filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling"). We therefore conclude that the Army's timeliness argument is in the nature of a statute-of-limitations defense that can be — and was — waived. Every court of appeals that addressed this issue has concluded that the time limit in § 2000e-16(c) is not a jurisdictional requirement. See Hedges v. United States, 404 F.3d 744, 749 (3d Cir. 2005); Boos v. Runyon, 201 F.3d 178, 183 (2d Cir. 2000); Belhomme v. Widnall, 127 F.3d 1214, 1216 n.1 (10th Cir. 1997); Bowden v. United States, 106 F.3d 433, 437 (D.C. Cir. 1997); White v. Bentsen, 31 F.3d 474, 475 (7th Cir. 1994); Ynclan v. Dept. of Air Force, 943 F.2d 1388, 1391 (5th Cir. 1991).

Nothing in this opinion precludes the Army from raising its untimeliness argument on remand.
appeal. See Holland v. Big River Minerals Corp., 181 F.3d 597, 605 (4th Cir. 1999).

Because Laber did not act in bad faith, his proposed amendment would not prejudice the Army, and the amendment is not futile, we conclude that the district

court abused its discretion in denying Laber's motion for reconsideration and to amend.[26]

[26]Our good colleague Judge Niemeyer would deny Laber the opportunity to amend his complaint, because he believes that Laber's amended complaint is futile. Judge Niemeyer makes two arguments in support of this contention: first, that the amended complaint will not initiate a "civil action" because Laber has already accepted the OFO's remedy, a fact that makes it impossible for him to place the question of the appropriate remedy before the court for de novo consideration; and second, that Laber's amended complaint is barred by his acceptance of the OFO's remedy based on notions of estoppel and equitable mootness.

We respectfully disagree with Judge Niemeyer's argument that Laber's amended complaint does not initiate a "civil action." Laber's amended complaint undoubtedly seeks a de novo judicial evaluation of the proper remedy. (Pl.'s Amended Complaint ("Plaintiff claims pecuniary, non-pecuniary compensatory damages, and to be made whole absent the discrimination . . . in accordance with all applicable laws.").) As we have observed (and refrained from deciding), it may be that one or more affirmative defenses, if raised on remand, will prevent Laber from obtaining such an evaluation. In such a case, Laber's "civil action" will fail, but it will not cease to be a "civil action." In other words, certain affirmative defenses, if raised on remand, may operate to deny Laber de novo judicial consideration of his claim, but this fact does not mean

that Laber's amended complaint does not seek judicial consideration of those issues in the first place. To hold otherwise, as Judge Niemeyer suggests, would convert affirmative defenses from arguments that must be raised by the defendant, see Fed R. Civ. P. 8(c), to threshold hurdles that the plaintiff must surmount. We believe such a holding is incorrect.

As to Judge Niemeyer's second argument — that Laber's suit is barred under the doctrines of estoppel and equitable mootness — we decline to address the argument because the Army did not make it. Judge Niemeyer cites a sentence from the Army's brief it suggests raises the estoppel and equitable mootness arguments, but it is clear that neither the quote nor any other portion of the Army's brief remotely resembles the argument Judge Niemeyer's dissent makes. If the Army wishes, it can raise the argument on remand, and the district court can address the issue with the benefit of full briefing.

V.

Laber finally argues that the district court erroneously granted summary judgment to the Army on his claims of age discrimination and retaliation. He contends that (a) he has made a prima facie case of age discrimination because he was qualified for the job in question and (b) Scott knew about his prior EEO activity before making the decision not to select him for the position.[27] We review this argument under the standards of review for summary judgment as set forth in Part III, supra.

A.

The ADEA creates a cause of action for certain[28] federal employees over the age of 40 who allege discrimination on the basis of age. See 29 U.S.C.A. § 633a. We apply the familiar McDonnell Douglas burden-shifting framework to resolve claims of age discrimination when the plaintiff produces no direct or circumstantial evidence of discrimination sufficient to warrant a "mixed-motive" analysis. See Desert Place, Inc. v. Costa, 539 U.S. 90, 101-02 (2003); Hill, 354 F.3d at 285. Under this framework, the plaintiff must first establish a prima facie case of discrimination. McDonnell Douglas, 411 U.S. at 802. To establish such a prima facie case, a plaintiff must demonstrate that: (1) he was a member of a protected class, i.e., that he was at least 40 years old; (2) his employer had an open position for which he applied and was qualified; (3) he was rejected despite his qualifications; and (4) the position remained open or was filled by a similarly qualified applicant who was substantially younger than the plaintiff, whether within or outside the class protected by the ADEA. See O'Conner v. Consol. Coin Caterers Corp., 517 U.S. 308, 310-312 (1996).

Once a plaintiff makes this prima facie case, he creates a presumption of discrimination, and the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for its

[27]It is undisputed that the district court had subject-matter jurisdiction on these claims or that the claims were timely.

[28]It is undisputed that Laber falls within the class of

federal employees covered by the ADEA.

adverse employment decision. See Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000); McDonnell Douglas, 411 U.S. at 802-03. If the defendant satisfies this burden, the presumption disappears and the plaintiff must show that the articulated reason is a pretext for age discrimination. See Reeves, 530 U.S. at 142-43; McDonnell Douglas, 411 U.S. at 804. To do so, the plaintiff must do more than simply show the articulated reason is false; he must also show that the employer discriminated against him on the basis of age. See Reeves, 530 U.S. at 146-47. In some cases, however, proof that the employer's reason is false is sufficient to show age discrimination when combined with the plaintiff's prima facie case. See id. at 147-48 (noting that "once the employer's justification has been eliminated, discrimination may well be the most likely explanation").

The district court held that Laber had not made a prima facie case of age discrimination because he failed to show he was qualified for the Operations Research Analyst position. Laber argues that he was qualified for the position because the civilian personnel office concluded that he was "minimally qualified" for the position. The record reveals, however, that the phrase "minimally qualified" does not mean that the applicant is actually qualified for the job in question. Instead, it means that the applicant is qualified for the generic duties of the job based solely on the pay grade and title, but it does not necessarily mean that he is qualified for the specific requirements of the particular job for which applications are being sought. While the

record is full of evidence to this effect, the testimony of Roxanne Dent, a staffing specialist, makes the point succinctly:

> A staffing specialist [at the civilian personnel office] made a determination to [Laber's] basic minimum qualifications. . . . But that doesn't mean that the manager can't also . . . . pick something special that's in his job, only in his job description and look for that kind of experience from the people that we give them. We try to give them the best qualified . . . , and then he or she's got [sic] to decide from there and look for things that they need this person to be able to do.

(J.A. at 502-03.) The testimony that Laber was "minimally qualified" for the generic position of Operations Research Analyst does not, therefore, support Laber's argument that he was qualified to perform the specific requirements of the Operations Research Analyst position for which Scott was interviewing.

Moreover, the record shows that Scott determined, after reviewing Laber's supplemental information, that Laber was "not eligible" for the Operations Research Analyst position Scott sought to fill. (J.A. at 470.) Scott testified that the position required cost benefit analysis, functional economic analysis, and independent cost estimates of the Army's weapons systems, and that Laber's Form 2302 revealed that Laber did not have the requisite education, experience, or training for the job requirements.[29] Short of his conclusory assertions that he was able to conduct the

appropriate analyses and make the appropriate estimates, Laber does not present any evidence that his education, experience, or training qualified him for the job. Cf. Evans v. Tech. Applications & Serv. Co., 80 F.3d 954, 960 (4th Cir. 1996) ("[The employee's] unsubstantiated allegations and bald assertions concerning her own qualifications . . . fail to . . . show discrimination."). We therefore conclude that Laber cannot satisfy his burden of showing a prima facie case of age discrimination.

B.

Like claims of age discrimination, we also apply the McDonnell Douglas framework to claims of retaliation.[30] See Beall v. Abbott

[29]Laber argues that the Form 2302 in the record is not the actual Form 2302 that Scott examined when Laber applied for the Operations Research Analyst position. Even assuming this is true, Scott's affidavit, which was given shortly after Scott's non-selection of Laber for the position, states that his "review of [Laber's Form 2302] concluded he didn't have appropriate experience which would qualify him for the position being recruited." (J.A. at 278.) Laber neither argues nor submits any evidence that this testimony was based on review of an incorrect Form 2302.

[30]We have never squarely held that either Title VII or the ADEA give federal employees the right to bring a retaliation claim. The Army does not argue that fed-

eral employees do not have a right to bring such a claim, and, because we affirm the district court's resolution of Laber's retaliation claim on other grounds, we may assume that such a right exists.
Labs., 130 F.3d 614, 619 (4th Cir. 1997). To establish a prima facie case of retaliation, a plaintiff must demonstrate that: (1) he engaged in protected activity; (2) an adverse employment action was taken against him; and (3) there was a causal link between the protected activity and the adverse action. See id. If the plaintiff establishes a prima facie case, we then apply the remainder of the McDonnell Douglas test — whether the employer has produced a legitimate, nondiscriminatory reason for the employee's non-selection and, if so, whether the employee can show that the reason is false, and, ultimately, that the employer retaliated against him. See id.

The district court held that Laber had not made a prima facie case of retaliation because the evidence showed that Laber informed Scott about his prior EEO activity after Scott made the decision not to select Laber for the position. We need not decide whether this holding was erroneous. See Jackson v. Kimel, 992 F.2d 1318, 1322 (4th Cir. 1993) ("In reviewing a grant of summary judgment, we can affirm on any legal ground supported by the record and are not limited to the grounds relied on by the district court."). Even assuming that Laber demonstrated a prima facie case of retaliation, the Army satisfied its burden of producing a legitimate, non-discriminatory reason for his non-selection by introducing evidence that Laber was not qualified for the job, Evans, 80 F.3d at 960 ("[E]mployee qualifications are widely recognized as

valid, non-discriminatory bases for any adverse employment decision."), and, as we concluded in the age discrimination context, Laber did not introduce sufficient evidence to create a factual issue on whether he was qualified for the specific position Scott was seeking to fill. We therefore conclude that Laber did not satisfy his burden of demonstrating that the Army's proffered justification was false.

VI.

For the foregoing reasons, we reverse the district court's denial of Laber's motions for reconsideration and to amend, vacate the district court's grant of the Army's motion for summary judgment on Laber's claim for additional relief, and remand with instructions to allow Laber to amend his complaint to put at issue the Army's alleged religious discrimination. We also affirm the grant of summary judgment to the Army on Laber's claims of age discrimination and retaliation.

REVERSED IN PART, VACATED ANDREMANDED IN PART, AND AFFIRMED IN PART

WILKINSON, Circuit Judge, concurring:

I am pleased to concur in Judge Williams's thorough opinion in this case. I do note that motions filed post-judgment for leave to amend a complaint are not favored under law. It takes a great deal of time and effort for a party to win any judgment. This effort

should not be routinely undone after a decision of the district court alerts a losing party to the deficiencies in its case.

Provision is made in the Rules for automatic amendment of the complaint in certain circumstances and for a liberal granting of leave to amend in other circumstances, see Fed. R. Civ. P. 15(a), but the interest in finality that attaches to every judgment must of necessity weigh in the exercise of the district court's discretion in a filing such as this. See, e.g., Benzon v. Morgan Stanley Distribs., Inc., 420 F.3d 598, 613 (6th Cir. 2005) (noting that "in the post-judgment context" the court "must also take into consideration the competing interest of protecting the finality of judgments and the expeditious termination of litigation") (internal quotation marks omitted); Doe v. Howe Military Sch., 227 F.3d 981, 989 (7th Cir. 2000) (although "leave to amend shall be freely granted when justice so requires, justice may require something less in post-judgment situations than in prejudgment situations") (internal quotation marks omitted); Vielma v. Eureka Co., 218 F.3d 458, 468 (5th Cir. 2000) (noting that the district court's discretion to allow amendments "narrows considerably after entry of judgment"). Abuse of discretion is, after all, a deferential standard, and district courts are in the best position to determine "when justice so requires" that a litigant be permitted to amend his complaint. Fed. R. Civ. P. 15(a).

In this case, I concur in Part IV's reversal for abuse of discretion solely because a special circumstance exists — namely, as Judge Williams points out, that Morris v. Rice, 985 F.2d 143 (4th Cir. 1993), and Peck-

er v. Heckler, 801 F.2d 709 (4th Cir. 1986), appeared to squarely and affirmatively authorize plaintiff's attempt to seek additional relief without putting the agency finding of defendant's liability at issue. Indeed, Laber's initial complaint may have been proper prior to today's ruling, and this would have obviated the need to amend the complaint in the first place. In this unique set of circumstances, I agree that Laber should be allowed to amend his complaint. In ordinary circumstances, post-judgment motions for leave to amend serve only to string litigation out.

WIDENER, Circuit Judge, concurring and dissenting:

I respectfully dissent from the majority holding that permits the plaintiff to assert, or to amend his complaint to again assert, his claim of religious discrimination, he having previously and successfully prosecuted the same and accepted the administrative award. I agree with the district court that it was without subject matter jurisdiction as to this aspect of the case. Laber had his day in court at least when he accepted the administrative award.

I concur in the majority decision to overrule the Pecker and Morris cases.

I concur in the majority decision affirming the grant of summary judgment to the defendant on plaintiff's claims of age discrimination and retaliation.

NIEMEYER, Circuit Judge, concurring in part and dissenting in part:

I concur in Parts I, II, III, and V of the majority opinion, and I dissent from Parts IV and VI. For the reasons given below, I would affirm the judgment of the district court.

I

Stan Laber, a civilian employee of the U.S. Army, claims that on two occasions the Army denied him promotion by reason of his religion and age and that the Army retaliated against him for filing claims with the EEOC, in violation of Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967. The EEOC's Office of Federal Operations found that the Army did in fact discriminate against Laber based on his religion and awarded him relief, albeit not all that he had claimed. The EEOC, however, ruled against Laber on his age-discrimination claim and his retaliation claim. After Laber filed various motions for reconsideration and for enforcement of the remedies awarded, the EEOC ultimately affirmed an award in favor of Laber for (1) over $9,000 in backpay, (2) a position as an industrial specialist in Germany, and (3) over $15,000 in attorneys fees. After Laber accepted all of the agency-awarded remedies, he commenced this action contending that the agency-awarded remedies for the religion-discrimination claims were inadequate and prosecuting his age-discrimination and retaliation claims de novo.

On the Army's motion for summary judgment, the district court dismissed all of Laber's claims, concluding with respect to his religion-discrimination claim

that the court did not have jurisdiction to review a claim made simply for additional remedies where "the substantive claims were decided at the administrative level and where the plaintiff accepted the relief afforded him at the administrative level." The court concluded with respect to the age-discrimination and retaliation claims that Laber lacked sufficient proof.

In dismissing Laber's claim that his agency-awarded remedies for religion-based discrimination were inadequate, the district court reasoned that because Title VII authorized only a de novo proceeding in court, the court did not have jurisdiction to consider his claim simply to enhance the agency remedies. Its reasoning parallels that which is written in Part III of the majority opinion. In addition, the district court concluded that it did not have jurisdiction because the plaintiff "has accepted the remedies afforded him in the administrative process" (emphasis added). As the court explained:

> Plaintiff accepted relief at the administrative level including attorney's fees, Sunday premium pay, and a position in Germany. Because he accepted the remedies afforded him at the administrative level, plaintiff cannot now request additional relief . . . because he is unhappy with the award he received in the administrative process.

II

The district court's reasoning and conclusions were correct, and I take issue with only its final observation

that as a result of its reasoning and conclusions, it did not have jurisdiction. I would conclude that its reasoning and conclusions lead more clearly to dismissal under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. But the district court's breach of the line between Rule 12(b)(1) and Rule 12(b)(6) does not require us to reverse the district court's conclusion to dismiss this case. See Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 249 (1951) (noting, "[a]s frequently happens where jurisdiction depends on subject matter, the question whether jurisdiction exists has been confused with the question whether the complaint states a cause of action"). Indeed the line separating the two has recently become even more indefinable. To recognize this, one need only compare the holding of Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49 (1987), where the Court held that the question whether § 505(a) of the Clean Water Act allows suits for wholly past violations was a matter of jurisdiction, with the holding in Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998), where the Court held that the question whether the Emergency Planning and Community Right-to-Know Act of 1986 allows suits for wholly past violations was a merits question disposable under Rule 12(b)(6). Moreover, it would be a meaningless act for us to remand for dismissal under Rule 12(b)(6) rather than Rule 12(b)(1).*

Whether under Rule 12(b)(1) or Rule 12(b)(6), the district court was correct in concluding that Laber's case had to be dismissed because he could not assert a de novo claim under Title VII. The possibility of a de

novo trial was foreclosed by his acceptance of the

*The majority suggests that because Laber's amended complaint "initiate[s] a 'civil action'" that "undoubtedly seeks a de novo judicial evaluation of the proper remedy," the fact that he might be precluded from prosecuting that action because he has already prosecuted an agency proceeding and accepted its remedy should be raised on remand through affirmative defenses. See ante at n. 26.

Of course, this conclusion turns blinders to the proceedings to date in which Laber did file a civil action in the district court and the district court did already dismiss it precisely because Laber had already pursued an agency action and could not now file a civil action de novo. The majority is running the procedure in this case in circles, and expensive ones for judicial administration.

agency remedies. Moreover, this is precisely the conclusion that must be drawn from the majority opinion in this case.

Explaining the holding in Chandler v. Roudebush, 425 U.S. 840 (1976), to conclude that the plaintiff's cause of action in a case such as the one before us can only be de novo, the majority has concluded, "The plain meaning of the term 'trial de novo' as used in Chandler demonstrates that a federal employee who brings a 'civil action' . . . is not entitled to limit the Court's review to the issue of remedy only." Ante at 19 (internal quotation marks, alterations, and citation

omitted). The majority thus reasons that "the federal employee's right to bring a 'civil action' does not include the right to seek only an additional remedy; for all practical purposes . . . a trial de novo proceeds as if no earlier proceedings had been completed at all." Ante at 19 (citing Colten v. Kentucky, 407 U.S. 104, 116-17 (1972) (noting that trial de novo represents a "completely fresh determination of [the issues]" (emphasis added))); see also Timmons v. White, 314 F.3d 1229, 1233 (10th Cir. 2003) (collecting Supreme Court decisions supporting the same).

Thus to state a cause of action that would entitle him to a trial de novo, Laber would have to be prepared to place all issues, both liability and remedy, on the table anew. Yet he could not place remedy issues on the table anew. He has accepted the agency-awarded remedies, which are not now retrievable. Thus, if in a trial de novo Laber were to lose on his religion-discrimination claim, he would stand to lose nothing, having already accepted and received agency-awarded remedies. Laber would therefore be left with only the possibility of seeking an additional remedy. Yet this type of claim is just what the majority forecloses when it states, "the federal employee's right to bring a civil action does not include the right to seek only an additional remedy." Ante at 19 (emphasis added). Despite this accurate statement of law, the majority, by remanding with a right to amend, gives Laber a new claim with no downside. I conclude that this is plain error.

III

In urging affirmance of the district court's ruling, the Army also contends that "there is no provision within Title VII . . . that allows a complainant to accept certain portions of an EEOC award and seek de novo judicial review of the rest." The Army argues that it would be inconsistent to allow Laber to keep the remedies awarded by an agency and at the same time seek de novo judicial review. While this argument rings of estoppel or mootness, the Army nonetheless suggests that these conclusions should lead to dismissal for lack of jurisdiction.

Regardless of the proper legal pigeonhole in which to place the Army's argument, I agree with the Army — and indeed the district court — that Laber "cannot have his cake and eat it too." He cannot retain the remedy awarded him by the agency and at the same time urge us to permit him to pursue a de novo judicial complaint; they are mutually inconsistent.

Even as the Army has mislabeled its argument as jurisdictional, the mislabeling does not bury the point. Because Laber cannot fulfill the elements of his de novo claim by putting all the remedies at risk, he must be barred not only by his inability to allege a claim for de novo remedies, but also by notions of estoppel or equitable mootness. See, e.g., MAC Panel Co. v. Virginia Panel Corp., 283 F.3d 622, 625 (4th Cir. 2002); Central States Pension Fund v. Central Transport, Inc., 841 F.2d 92, 95 (4th Cir. 1988).

In Central States, a pension plan sought to overturn a bankruptcy court's confirmation of a plan for reorganization of a trucking company. Pending appeal,

however, the pension plan did not file a supersedeas bond, as required for a stay, and by the time the case reached this court, the plan had been substantially implemented. In response to the pension fund's argument that limited relief might still be appropriate from us, we stated that even limited relief "would require the Class 6 creditors to surrender their advantage," which they had not done. Id. at 96. In dismissing the appeal, we stated:

> Orders confirming plans of reorganization do not become immune from appellate review upon their partial, or even substantial, implementation. On the other hand, dismissal of the appeal on mootness grounds is required when implementation of the plan has created, extinguished or modified rights, particularly of persons not before the court, to such an extent that effective judicial relief is no longer practically available.

Id. (internal citations omitted) (emphasis added). Articulating the doctrine more completely in MAC Panel, we said:

> [T]he doctrine of equitable mootness is a pragmatic principle, grounded in the notion that, with the passage of time after a judgment in equity and implementation of that judgment, effective relief on appeal becomes impractical, imprudent, and therefore inequitable. 283 F.3d at 625.

While I continue to believe that Laber should not

now be allowed to pursue his claim because he cannot set forth a de novo claim upon which relief can be granted and therefore would affirm the district court on that basis, I am just as prepared to affirm the dismissal under the doctrine of equitable mootness. Although the Army did not specifically label its argument with the name of that doctrine, it nonetheless vigorously argued the substance of the point in its brief, just as the district court relied on it to justify its dismissal.

For all of these reasons, I would affirm the judgment of the district court granting summary judgment to the Army on Laber's religious-discrimination claim.